Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BENTON MUSSLEWHITE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Benton Musslewhite
1520 Lyric Office Center
440 Louisiana
Houston, Texas 77002
Telephone (713) 222-2288
Facsimile (713) 222-0319

Pro Se/Lead Counsel for
Petitioners

Questions Presented

Question No. 1

The petitioner was suspended in a completed state court proceeding, primarily for alleged violations of the Texas advertising rules. He attempted to raise, in the state court proceedings, two important constitutional issues (among others): (1) whether his rights under the First Amendment were violated by reason of the prosecution under the advertising rules; and (2) whether he was the victim of a selective discriminatory prosecution in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment. The state courts failed and refused to address these issues. Petitioner later filed the present civil rights suit in the federal district court below and asserted in the

complaint, on behalf of himself and a class composed of solo practitioners in Texas, a broad, general attack upon the disciplinary scheme in Texas, alleging that it unconstitutionally discriminates against solo practitioners and unduly protects members of large law firms. The Fifth Circuit held that the federal courts do not have subject matter jurisdiction over such general constitutional attack.

The first question presented is whether the federal courts do have, as an exception to the Feldman doctrine, subject matter jurisdiction over the broad, general class action, constitutional attack upon the Texas' disciplinary scheme or whether the Fifth Circuit was correct in holding that such general constitutional attack was "inextricably intertwined" with the prior

state court action just because there was some relationship between such prior action and the general constitutional attack, and despite the fact that it would not be necessary for the federal court to review the state court judgment in order to resolve the general constitutional attack? In addressing this question the Court would be resolving a conflict between two lines of cases among the circuit courts of appeals and would be resolving a question of exceptional importance.

Question No. 2

The second question presented is whether the refusal and/or failure of the Texas state courts to address, and "fully and fairly" adjudicate in the prior state court action, the two important constitutional issues referred to above - the First Amendment issue and the Equal

Protection, discriminatory prosecution issue - vested, separate and apart from the exception to the Feldman doctrine, subject matter jurisdiction in the federal courts to determine whether such refusal and/or failure to adjudicate those important constitutional issues in itself constituted a violation of petitioner's rights under the Due Process clause. Again, the Fifth Circuit's holding in this regard directly conflicts with a number of Supreme Court and other circuit courts of appeals' decisions.

Question No. 3

The petitioner also alleged that the entire proceedings against petitioner, from start to finish, had been fraught with bad faith, bias, flagrant abuse of constitutional rights, frivolous and malicious prosecutions, duress, retaliation and harassment, and that this

bad faith conduct includes subsequently filed, still ongoing, disciplinary proceedings, which proceedings are also frivolous and filed in bad faith and in retaliation against petitioner for filing this federal court suit. The Fifth Circuit ruled that it did not have subject matter jurisdiction over petitioner's bad faith claims under the bad faith exception to Younger because, it held, that the bad faith doctrine is not an exception to Feldman.

The third question presented is whether the federal court has subject matter jurisdiction with respect to a completed state court action conducted in bad faith, where most of the facts and circumstances indicating bad faith did not arise or become known until after the state court had entered judgment in the prior state court action and whether,

even if there is no subject matter jurisdiction over the completed state court action, there is still subject matter jurisdiction to consider whether the subsequently filed state court actions, which are still ongoing, are being conducted in bad faith and for retaliation and harassment purposes.

Again, the holding of the Fifth Circuit in regard to the bad faith claims is in direct conflict with decisions of the Supreme Court and other circuit courts of appeals.

Question No. 4

The Fifth Circuit issued a published opinion on July 19, 1994. It partially reversed and partially affirmed, holding that the district court should have accepted jurisdiction over petitioner's bad faith claims. None of the parties filed a petition for rehearing or

rehearing en banc. Far more than 21 days after the issuance of the July 19, 1994 opinion, on September 23, 1994 the Fifth Circuit, without any notice to the parties and without any explanation as to why it had not issued the mandate as required by Rule 41(a), F.R.A.P., withdrew its July 19, 1994 opinion and replaced it with an opinion in which it completely affirmed the dismissal by the district court.

The fourth and final question presented is whether the Fifth Circuit panel had the power to, or could properly, issue a new opinion long after the 21 days provided for in rule 41 had expired, particularly where the new opinion changed the substantive holding in the case and did so without alluding to any "exceptional circumstances" or "good cause" sufficient to "override the

strong public policy that there should be an end to a case in litigation"? The holding of the Fifth Circuit that it could simply change its mind after the 21 day period provided for in Rule 41 had expired is in direct conflict with a number of opinions of the other circuit courts of appeals.

LIST OF PARTIES

Petitioners/Appellants/Plaintiffs

Benton Musslewhite

Respondents/Appellees/Defendants

The State Bar of Texas
M. Collen McHugh
Martha S. Dickie
Charles A. Beckham
Antonio Alvarado
Steven L. Martin
Charles O'Reilly
Kirk Watson
Jerry Secrest
Spencer C. Relyea
Richard C. Hile
Tom Cunningham
James M. McCormack
Karen R. Johnson
Steven Peterson
Steven Smoot
James N. Parsons
Harriet Miers
Charles R. Dunn

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Petitioner, Benton Musslewhite, files this petition and brief to urge the Court to grant certiorari and review of the decisions below.

OPINIONS BELOW

The opinion under the U.S. Court of Appeals for the 5th Circuit, concerning

which Writ of Certiorari is sought in this case, can be found at 32 F. 3d 942, (5th Cir., Sept. 23, 1994) and is reproduced as App. A., p. A1 of the Appendices. The first opinion of the Court of Appeals, which was subsequently withdrawn, was at one time reported in 25 F. 3d 1300 (5th Cir., July 19, 1994) and is attached as Exhibit B, p. A26 of the Appendices. The decision of the Federal District Court is unreported and is reproduced as App. C, p. A57 of the Appendices.

JURISDICTION

The Court has jurisdiction to review a final judgment of a court of appeals pursuant to 28 U.S.C. § 1254 (1). The final judgment of the Court of Appeals was entered on September 23, 1994 and a timely filed Petition for Rehearing and

Rehearing En Banc was overruled on December 5, 1994. The Order overruling Petition for Rehearing and Rehearing En Banc is reproduced as App. D, p. A59 of the Appendices. The copy of the Plaintiff's Original Complaint in the U.S. District Court for the Southern District of Texas is reproduced as App. E, p. A61 of the Appendices.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the First and Fourteenth Amendments to the U.S. Constitution. The First Amendment is reproduced as App. F, p. A99 of the Appendices and the Fourteenth Amendment is reproduced as App. G, p. A103 of the Appendices. This case also involves Rule 41, Federal Rules of Appellate Procedures. Rule 41 is reproduced as App. H, p. A113 of the Appendices.

A. Statement of the Case and Procedural History

This case involves a civil rights action against the State Bar of Texas ("SBOT") and some of its present and former officers. The petitioner alleges that he was, and still is, the victim of a discriminatory, unconstitutional and persecutorial vendetta that was and still is being conducted in bad faith and seeks relief both individually and as representative of a class.

Petitioner concedes that he has always been a controversial trial lawyer.[1] His aggressive use of press

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[1] Petitioner received his undergraduate and LLB from Southern Methodist University, graduating from law school with honors (order of the Woolsack); a degree in Military Law from the University of Virginia; and a LLB from Georgetown University, again graduating with honors. He was later appointed by President Kennedy as Advisor to the National Council on Physical

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Fitness and to the Advisory Council for the Area Redevelopment Administration. He has always been a controversial member of the liberal wing of the Democratic Party, having, in 1962, lost a race for Congress against a popular incumbent conservative Democrat by a margin of only 41 votes out of 65,000 cast and having been one of only two delegates, out of 100 in the Texas delegation to the 1968 Democratic Convention, to vote for Senator Eugene McCarthy as the nominee for President. As a lawyer he has specialized in international law, handling numerous cases on behalf of non-American plaintiffs, see Chick Kam Choo v. Exxon, 486 U.S. 140 (1988), and environmental law, having been one of the nine members of the Agent Orange Plaintiffs Management Committee ("AOPMC") in the Agent Orange Class Action in Brooklyn, N.Y. and having been the only one of the nine to have resigned from the AOPMC in order to oppose what he considered to be a "grossly inadequate settlement that is a disgrace to the memory of those who served our country in Vietnam." See In Re Agent Orange, 800 F.2d 14 (2nd Circ. 1986) (rejecting the effort of the other members of the AOPMC to have petitioner disqualified from opposing the settlement) and 818 F.2d 145 (2nd Circ.) cert. den. 484 U.S. 1004 (1988) (affirming the settlement over petitioner's opposition). Petitioner is the only member of the original AOPMC who is still fighting for compensation for veterans and civilians who were injured

conferences at or near mass disasters - particularly foreign disasters - to make victims and their personal solicitors, barristers or attorneys aware of the potential for bringing their lawsuits in the United States, angered a number of influential members in the power structures of both the defendants' and

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by exposure to Agent Orange in Vietnam. See Ivy v. Diamond Shamrock, 901 F.2d 7 (2nd Circ. 1990) cert. den. 114 S.Ct. 1125 (1994) and Ryan v. Dow Chemical, 781 F.Supp. 934 (E.D.N.Y. 1992) lv. to Appl. den., No. 92-8008 (2nd Cir. May 8, 1992, Appl, dism., No. 92-7846 (2nd Cir. June 16, 1992) cert. den. 113 S.Ct. 599 (1992). Petitioner refused to join the Houston Trial Lawyers Association and resigned from the Board of Directors of the Texas Trial Lawyers Association because he believed they had forsaken aggressive protection of victims' rights for a superficial attempt to wrap themselves in the flag of self righteous ethics. Petitioner is also president and chairman of the Board of Directors of One World Now, Inc., a non-profit organization dedicated to transforming, democratizing and empowering the United Nations.

plaintiffs' bar. What these powerful individuals and the SBOT, principally through its general counsel and assistant general counsel, Steve Peterson ("Peterson") and Steve Smoot ("Smoot"), conspired to do, and did do to the petitioner, is shameful and reprehensible. Simply stated, they set out to destroy the petitioner, to make him a scapegoat for a politically motivated crusade against"solicitation" and to chill the exercise of his First Amendment rights. So far they have succeeded.

In 1987, the SBOT instituted two frivolous lawsuits in the Texas state court to disbar petitioner. The primary focus of these two lawsuits was "solicitation" and they coincided with the politically volatile "tort reform"

crusade in the Texas Legislature that year. A disbarment suit was also filed by the SBOT against John O'Quinn ("O'Quinn"), containing the very same solicitation allegations that had been asserted against petitioner except that additional allegations were asserted against O'Quinn. The SBOT hired a special prosecutor, Tom Alexander ("Alexander"), to prosecute petitioner and O'Quinn, provided him with a substantial slush fund and authorized him to hire the nationally known investigator, Clyde Wilson. Alexander maliciously prosecuted the case against petitioner and O'Quinn in the press, in violation of their due process rights. See Sheppard v. Maxwell, 394 U.S. 333 (1966). But to Alexander's credit, he did discover and expose the fact that

Peterson had made a secret sweetheart deal with O'Quinn whereby O'Quinn would be let off with a "wrist-slap" reprimand and the vendetta would continue with petitioner as its sole scapegoat. After that revelation, Peterson/O'Quinn et. al. succeeded in getting Alexander fired.

Then petitioner made his greatest mistake. He naively believed that he could trust Peterson, Smoot and the SBOT to keep their word and he entered into a settlement. On the basis of their express and implied assurances, which turned out to be false and fraudulent, see paragraph 8 of the complaint attached as App. 8, petitioner agreed to a settlement that included a 3-year probation.[2] Within eight months of that

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[2] Other considerations that prompted petitioner to accept the settlement were that he was financially

settlement, however, Peterson, Smoot, Jim Sales, then President of the SBOT, Hartley Hampton, a member of the power structure of the plaintiffs' bar, and the SBOT (hereinafter collectively referred to as SBOT) launched a vicious and frivolous revocation proceeding based upon trumped up charges primarily centered upon petitioner's exercise of his First Amendment rights in a press conference in Aberdeen, Scotland in connection with the Piper Alpha disaster.[3]

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exhausted, facing a heavy trial and appellate docket for the upcoming next few months, and simply wanted to buy his peace.

[3] The SBOT based its revocation petition pertaining to the Piper Alpha matter upon 3 communications: a press release, newspaper ad and a letter. It was undisputed that in all three, the survivors of the victims of that tragic disaster were expressly told that

SBOT brutally disregarded procedural due process, giving petitioner only 6 days notice of both the revocation petition and trial, in violation of Roller v. Holly, 176 U.S.398 (1900) and Rules 99 and 245 of the Texas Rules of Civil Procedure, and putting petitioner to trial without an attorney and time to prepare. The appointed trial judge, Judge Solomon Casseb, who was the trial judge in the Texaco/Pennzoil case and extremely friendly with members of the plaintiffs' bar power structure who were unfriendly to petitioner, and therefore biased. He refused to grant petitioner a jury trial, in violation of the State Bar Rules (then Art.10, Sect. 16(I)), the

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petitioner and his team of lawyers would not discuss or accept representation except through the survivors' personal solicitors or attorneys.

implied terms of the agreed settlement and the doctrine against anticipatory waiver of the right of trial by jury.

Judge Casseb also ignored the mandate in Bates v. Arizona State Bar, 433 U.S. 356, 383, nte 37 (1977) that the state cannot regulate speech of an attorney directed toward those who are "legally sophisticated", such as other attorneys, see discussion under II, infra, blatantly refusing to adjudicate petitioner's First Amendment claims. Judge Casseb also refused to adjudicate the discriminatory prosecution issue. Moreover the full extent of the facts relevant to the discriminatory prosecution of petitioner did not become discernible until long after the judgment was entered in the revocation proceedings.

Judge Casseb revoked probation and imposed punishment - 3 years suspension- so excessive that it violated petitioner's due process rights. See Solem v. Helm, 77 L.Ed.2d 637 (1983).[4] The petitioner appealed to the Texas court of appeals but that Court deferred the First Amendment issue to the Texas Supreme Court. Musslewhite v. State Bar of Texas, 786 S.W.2d 437, (Tex.App.-Hou [14th Dist.] 1990). Judge Casseb also refused to adjudicate the discriminatory prosecution issue and the state court of appeals expressly and flatly refused to permit petitioner to raise the

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[4]The great majority of attorneys in Texas have received only a reprimand for violations of the advertising rule, DR2-101. Up to the time of petitioner's prosecution, the most that any Texas attorney, other than petitioner, had ever received for a violation of the advertising rule is a 60-day suspension.

discriminatory prosecution issue in that Court. The Texas supreme court refused writ of error and this Court refused writ of certiorari. 111 S.Ct. 2891 (1991).

Thus, the state courts failed and refused to address and decide the two key constitutional issues in the case - whether the petitioner's communications seeking to obtain an audience with other lawyers and solicitors were protected by the First Amendment and whether petitioner had been the victim of discriminatory prosecution in violation of the Equal Protection clause of the Fourteenth Amendment.

Long after Judge Casseb had handed down his brutal judgment, the defendants finally concluded their sweetheart deal with O'Quinn, agreeing to give him a reprimand. In the Texas Lawyer, the deal

was labeled a "wrist-slap" and Peterson was quoted as admitting that the SBOT really did not ever have a solicitation case against O'Quinn, which means, even more so, that the SBOT never had a solicitation case against petitioner.[5]

Also, long after Judge Casseb entered his judgment, it became apparent that the SBOT was not going to prosecute Kelly Newman ("Newman"). He was in Scotland with petitioner and much more

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[5] At the inception of the State Bar anti-solicitation crusade, the State Bar announced it was investigating "17 lawyers". One of those was an attorney by the name of Arthur Schechter ("Schechter"). The Bar had substantial evidence that Schechter had maintained the classic case-running operation in his office, (using the taking of photographs as a pretext for bait-and-switch solicitation) but Schechter hired an attorney by the name of David Berg ("Berg"). Berg was known to be close to Peterson. Schechter was never prosecuted. O'Quinn also hired Berg and Berg worked out the sweetheart deal with Peterson on behalf of O'Quinn.

heavily involved in the press release, ad and letter pertaining to the Piper Alpha disaster, than was petitioner. Newman and petitioner jointly prepared the press release but Newman alone prepared and signed the letter and ad (petitioner was not ever mentioned in either) and it was undisputed that Newman sent and ran them over petitioner's strenuous objection. Yet the SBOT, while condemning petitioner to three years of misery, made no effort to prosecute Newman. In July of 1993, the statute of limitations ran with regard to any prosecution of Newman.

Furthermore, again long after the judgment in the underlying action was rendered, it became apparent that SBOT had no intention of attempting to prosecute any of the other "17 lawyers" they initially stated they were

investigating.

The discriminatory treatment of petitioner, when compared to that of O'Quinn, Schechter and Newman and the other plaintiffs' lawyers who supposedly had been targeted for investigation for solicitation, clearly violated petitioner's due process and equal protection rights. See Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982) and discussion under II, infra.

Petitioner then filed a bill of review in state court (to set aside the agreed settlement which had been used as the basis for the revocation proceeding) and the SBOT retaliated by filing another frivolous disbarment suit in the state court, which is still pending. Petitioner then filed this suit in federal court and the SBOT again

retaliated with another frivolous disbarment suit in state court, which also is still pending.

The petitioner's allegations in this suit can be divided into five primary categories: (1) broad class action general, constitutional assault upon the entire State Bar disciplinary scheme, alleging that, as designed, implemented and enforced, it unconstitutionally discriminates against solo practitioners;[6] (2) claims that, as an

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[6] This discrimination against sole practitioner was foreseen by the Texas supreme court itself in O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 404 (Tex. 1988), wherein Justice Kilgarlin, speaking for the Court, stated:

> "One point, not raised, and as to which there has been no development of facts, troubles us. That concern is the concession made during oral argument by counsel for the State Bar that he knew of no instances of grievance prosecution of lawyers who make in-person solicitation of

potential clients either personally or through agents, apart from plaintiffs' attorneys in personal injury litigation. Indeed, this selective prosecution seems to enjoy the sanction of the State Bar Rules.....Thus, solicitation of a casualty insurance company's claims manager might pass muster or the wining and dining of a corporate executive thinking of relocating his company in Texas could be arguably acceptable, even though the conduct in both instances amounts to "running cases." One need only read the occasional stories in newspaper business sections to be aware that sophisticated solicitation by law firms of corporate clients occurs more than infrequently.....Without a development of facts by the trial court, however, this court cannot pass upon the question of whether the disciplinary rules are constitutionally infirm because of the apparent inequality in their enforcement. Nevertheless, if in-person solicitation of clients is an evil requiring prevention, the restriction should be applied to all lawyers irrespective of whether they litigate or never go to the courthouse, whether they represent plaintiffs or defendants, or whether the action sounds in tort or contract."

763 S.W.2d at 404

exception to the Rooker/Feldman and Younger doctrines, the prosecution of petitioner in the past and ongoing state court cases was and is being carried out in bad faith, with the purpose of retaliating against and harassing the petitioner; (3) a group of specific constitutional claims (primarily the First Amendment and discriminatory prosecution claims) that are not barred by Rooker/Feldman because petitioner did not have a reasonable opportunity to litigate them in state court since either the state courts refused to consider them or their facts did not crystallize until after the state court proceedings were completed; (4) claims involving declaratory judgment and injunctive relief with respect to the prospective

impact of defendants' unconstitutional actions; and (5) pursuant to the pendant jurisdiction of the court, a direct attack upon the prior state court judgment by way of bill of review. See complaint attached as App. E.[7]

After the district court dismissed all claims on the ground that it had no subject matter jurisdiction, the Panel partially reversed and partially affirmed, holding that petitioner could proceed on his bad faith claims. Musslewhite v. State Bar of Texas, 25 F.2d 1300 (5th Cir., July 19, 1994); opinion attached because withdrawn; see

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[7] Lest the Court assume that petitioner is taking liberties with the facts alleged in the complaint, most of the matters asserted can be found in the record, newspaper articles and the SBOT files, to which the San Antonio press had, at one time, access.

App. B. Neither petitioner nor the defendants filed a petition for rehearing or rehearing en banc with respect to the July 19th decision. Without any prior notice to the parties, the Panel withdrew its July 19th opinion and filed another opinion on September 23, 1994. App. A. In that opinion the Panel completely affirmed, holding that all of petitioner's claims, including the bad faith claims, were barred by the Feldman doctrine. The Panel made no attempt to advance any "exceptional circumstances" that would justify not issuing the mandate on the 21st day after the July 19th decision; it cited no sudden change in the law; it is obvious, from a comparison of the two decisions, that, some 46 days after it was supposed to have issued the mandate, the Fifth

Circuit Panel for some strange reason simply changed its mind.

It is important to note that the Panel below, in both the first and the second decisions, did not question that the petitioner had adequately alleged the five categories of claims listed above. Therefore, this is not a case involving questions of construction of a complaint, although the Panel did place an erroneous "spin" upon many of the allegations.

The issues presented in this petition relate to the substantive erroneous holdings of the Fifth Circuit in its second decision. Properly framed, these holdings are:

(a) That a broad, sweeping, class action allegation "generally attacking" the Texas State Bar disciplinary scheme -

on the ground that it discriminates, in violation of the equal protection clause, against solo practitioners - cannot be asserted by any person against whom a final judgment of discipline has been previously rendered, even though no such broad constitutional, class action attack was a part of the prior state court case; even though, as to that one person, the state courts in the prior case refused to adjudicate the issue of discriminatory prosecution and/or the facts relevant to discriminatory prosecution did not become discernible until <u>after</u> the judgment was rendered in the prior case; and even though the prosecution of such person in the prior case - as that prosecution stands in the light of later events - is but one evidentiary example, out of many, tending to prove the merits of the

general constitutional attack upon the disciplinary scheme of the State Bar. See 32 F.3d at 947; App. A.

(b) That, despite an adequate allegation of bad faith prosecution involving retaliation and harassment, a person cannot sue in federal court under the Civil Rights Act where a previous judgment of discipline has ever been rendered against him, because the Feldman doctrine[8] does not recognize an exception based upon bad faith, unconstitutional, retaliatory and harassing prosecution; the Fifth Circuit necessarily held that, even where, as in this case, the prior prosecution is but one example, among many others, of bad faith prosecution

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[8] District of Columbia v. Feldman 460 U.S. 462, 103 S.Ct. 1303 (1983).

against an individual and the pattern of bad faith, retaliatory and harassing prosecution is still ongoing[9], the federal court, because of the Feldman doctrine, still will have no jurisdiction. 32 F.3d at 947, 948; App. A.

(c) Though recognizing the rule that a federal civil rights suit is

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[9] The Fifth Circuit stated that "the state proceeding here in question is not ongoing." 32 F.3d at 948; App. A. This is a remarkable, really shocking, statement in view of the express allegation in the Complaint in question that: "Defendants' vendetta is ongoing as evidenced by the fact that they (the State Bar and Defendants) have filed new disciplinary charges against (plaintiff), which charges are known by Defendants to be without merit. Said charges are currently pending before the 265th District Court of Harris County, Texas." par. 3.42, App. E. In the prayer, petitioner asked for an injunction against such further prosecutions. App. E.

generally viable where it is alleged that "the state prosecution is taken for the purpose of deterring constitutionally protected conduct", citing Smith v. Hightower, 693 F.2d 359 (5th Cir. 1982)[10], the Fifth Circuit nevertheless held that such rule[11], in view of

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[10] Petitioner expressly alleged:

"Defendants' conduct as alleged herein has deprived, and continues to deprive, Plaintiff of his rights secured under the First Amendment to the U.S. Constitution"; par. 5.4, App. E, and see par.3.43 (re "chilling effect .. from further exercise of the liberties of speech"), App. E.

[11] The Fifth Circuit never mentioned the fact that the state courts refused to adjudicate the First Amendment and the discriminatory prosecution issues. Nor did the Fifth Circuit mention that the relief sought was aimed at prospective effects and did not seek to overturn the prior judgment of discipline (except through the "bill of review", a direct attack upon the judgment based upon the "pendant jurisdiction" of the court). See entire Opinion, App. A.

Feldman, does not apply where the plaintiff has ever been successfully disciplined in a prior proceeding.

(d) The Fifth Circuit in this case necessarily held that other issues which usually justify federal civil rights jurisdiction - such as the refusal and failure of the state courts, in the prior proceeding, to adjudicate constitutional issues raised by the complaining party, or such as where the key facts relevant to such constitutional issue do not materialize until after the judgment has been rendered in the prior proceeding so that the complaining party could not have raised such issues even if he had wanted to - can simply be ignored at the whim of the court.

As will be shown, the above holdings are in direct conflict with Supreme Court

law and/or the holdings of the other courts of appeals.

Reasons For Granting The Writ

II. The Fifth Circuit Holding That the Federal Court Does Not Have Subject Matter Jurisdiction Over A Broad and General Class Action Attack Upon The Disciplinary Scheme of the State Bar of Texas - To The Effect that It Discriminates, In Violation of the Fourteenth Amendment, Against Solo Practitioners - Conflicts With Several Decisions of Other Circuit Courts And Presents A Question of Exceptional Importance.

As noted above, the petitioner alleged in clear and certain terms, on behalf of himself and a class he seeks to represent, that:

> "9.2 Defendants unfairly target attorneys involved in the solo practice of law....for prosecution and punishment under the Defendants' disciplinary rules. Defendants ignore or lightly treat alleged rule violations by members of larger firms. This distinction maintained by Defendants is

> arbitrary in that it bears no rational relationship with any legitimate end of Defendants.
>
> 9.3 The members of the class of small firms or solo practitioners are suffering deprivation of their rights of equal protection and due process of law at the hands of Defendants.....
>
> 9.6 Defendants' practices are in violation of the rights of the class as a whole. Therefore, damages, declaratory and injunctive relief with respect to the class.....is appropriate."

Par. 9, App. E.

It is obvious that, at no place in the Complaint, did the petitioner ever seek, on behalf of himself insofar as the class action cause of action is concerned, or on behalf of the class, to have the district court act as an appellate court with respect to the prior judgment of suspension against petitioner. While the complaint did say

that the discriminatory prosecution of Petitioner in the underlying state court proceeding "is consistent with Defendants' continuing policy of selective and unfair prosecution against certain members of the Bar of this State", the success or failure of the class action was not dependant upon whether the underlying state court judgment against petitioner was proper or not.

Indeed, the only direct assault against the underlying state court judgment was made in the allegation of the pendant jurisdiction claim of a "bill of review", which is the procedure for directly attacking state court judgments under Texas law. See par. 8, App. E. Perhaps the inclusion of the "bill of review" confused the courts below, but it

should not have.

In Feldman, the Court directly addressed the question of subject matter jurisdiction in civil rights cases brought by a plaintiff against whom a prior state court judgment has been entered, involving the same general subject matter as the subsequent civil rights suit. The Court laid down this venerable rule:

> "..Therefore, to the extent that Hickey and Feldman sought review in the District Court of the District of Columbia Court of Appeals' denial of their petition for waiver, the District Court lacked subject-matter jurisdiction over their complaints. Hickey and Feldman should have sought review of the District of Columbia Court of Appeals' judgments in this Court. To the extent that Hickey and Feldman mounted a general challenge to the constitutionality of Rule 46 I(b)(3), however, the District Court did have subject-matter jurisdiction over their complaints.

103 S.Ct. at 1315, 1316; emphasis ours.

The Court made it clear that "United States district courts ..have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case". 103 S.Ct. at 1317. The Court added a caveat which has become the source of some conflict among the circuit courts:

> "...If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do."

In Pennzoil v. Texaco, 481 U.S.1, 107 S.Ct. 1519 (1987), a clear majority of the Court agreed that the district

court in that case had initial subject matter jurisdiction over at least some of Texaco's constitutional claims, despite the existence of the state court judgment against it (see concurring opinions of Justices Scalia and O'Connor, 107 S.Ct. at 1529, 1530; Justices Brennan and Marshall, 107 S.Ct. at 1530, 1532[12]; Justice Blackmun, 107 S. Ct. at 1534-35; and Justice Stevens, 107 S. Ct. at 1535-38, particularly at 1536 and nte. 3). As Justices Scalia and O'Connor observed, in resolving "the constitutionality of the Texas bond and lien provision", the Court "need not decide any issue either actually litigated in the Texas courts or

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[12] Justice Brennan observed that the "inextricably intertwined" caveat does not apply if the federal action sought is "'separable from and collateral to' the merits of the state court judgment." 107 S.Ct. at 1531.

inextricably intertwined with issues so litigated." 107 S.Ct. at 1529-30.

The courts of appeals seem to have diverged into two approaches to this issue. Some seem to take the approach taken by the Fifth Circuit in this case - if the prior state court action has any relevance at all to the general constitutional challenge to the state rules in question, then the Feldman bar will apply and the federal courts will not have jurisdiction over such general constitutional challenge. See, in addition to the decision of the court of appeals in this case, the Seventh Circuit cases of Leaf v. Sup. Ct. of State of Wisconsin, 979 F.2d 589, 598-99 (7th Cir. 1992) cert. den. 113 S.Ct. 2417; Ritter v. Ross, 992 F.3d 750, 752-54 (7th Cir. 1993) cert. den. 114 S.Ct. 694; and

Wright v. Tackett, 39 F.3d 155, 157, 58 (7th Cir. 1994); the Fourth Circuit case of Guess v. Bd. of Medical Examiners of State of N. Car., 967 F.2d 998, 1002-05 (4th Cir. 1992); the Ninth Circuit cases of Mackay v. Pfeir, 827 F.2d 540, 542-45 (9th Cir. 1987) and Partington v. Gedan. 961 F.2d 852, 864-65 (9th Cir. 1992); and the Eleventh Circuit case of Berman v. Fla. Bd. of Bar Examiners, 754 F.2d 1529, 1530 (11th Cir. 1986).

On the other hand, there are a line of cases that definitely take a more liberal view of federal jurisdiction in these situations and are in conflict with the Fifth Circuit decision in this case and the decisions cited above. See the First Circuit case of Schneider v. Colegio de Abagados de Puerto Rico, 917 F.2d 620, 628-29 (1st Cir. 1990); the

Second Circuit case of Zimmerman v. Grievance Committee of Fifth Jud. Dist., 726 F.2d 85, 86 (2nd Cir. 1984); the Third Circuit cases of Schumacher v. Nix., 965 F. 2d, 1262, 1266, nte 6 (3rd Cir. 1992) ("although Schumacher applied for and was denied permission to sit for the Pennsylvania bar examination, the complaint before us presents a general constitutional challenge to Rule 203 (a)(2)(ii)") and Marks v. Stinson, 19 F.3d 873, 885-86, nte. 11 (3rd Cir. 1994); the Ninth Circuit case of Dubinka v. Judges of the Superior Court, 23 F.3d 218, 221-22 (9th Cir. 1994); and the Tenth Circuit case of Razatos v. Colorado Sup. Ct., 746 F.2d 1429, 1433 (10th Cir. 1984).

The conflict between these two groups of cases is not based upon a

difference in facts but is based upon a very fundamental difference in their approach to the question of federal court jurisdiction in such cases and a very different spin upon the rules set forth by this Court in Feldman and Pennzoil v. Texaco. For example, in this case the Fifth Circuit rejected jurisdiction even though the class action general constitutional attack upon Texas' disciplinary scheme clearly could be resolved without regard to whether or not the judgment in the earlier state court proceeding was correct. The Fifth Circuit obviously felt that, just because petitioner was involved in both cases and petitioner was claiming discriminatory prosecution in both cases, the two cases are inextricably intertwined. On the other hand, in Schneider, Zimmerman,

Schumacher, Marks Dubinka and Razatos, the facts were basically the same as in this case- a broad constitutional attack alleged which generally related to the prior state court action but which did not require, for its resolution, a review or reexamination of the state court action - and these courts reached an opposite result, holding that the federal courts did have subject matter jurisdiction.[13]

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[13] For a statement of the essence of the liberal view, see Mattas v. Supreme Court of Pa., 576 F.Supp. 1178 (W.D. Pa. 1983) where the court stated:

> "The remaining counts ask us to consider the constitutionality of the disciplinary rules, because they....do not provide for a neutral decision-making body. Though these claims related indirectly to Mr. Mattas' particular case....we believe that the allegations regarding the hearings and the make-up of the boards are sufficiently general to permit this Court to review the specific order of

There are two other groups of cases with which the decision of the Fifth Circuit in this case fatally conflicts:

(a) Those cases which hold that where the allegedly similar issue (between the federal general constitutional challenge and the prior state court action) - in this case the issue of discriminatory prosecution in violation of the Fourteenth Amendment - was not actually adjudicated, though presented, in the state court case or for some reason could not have been presented in the state court case, the Feldman doctrine does not bar jurisdiction over

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suspension. Any decision we would make on the merits of these constitutional attacks would apply to any Pennsylvania lawyer facing disciplinary procedure."

576 F.Supp. at 1184.

the general constitutional challenge. See decisions discussed under II below.

(b) Those cases which hold that where some of the plaintiffs were not parties to the prior state court action, such plaintiffs' subsequent general constitutional challenge in the federal court certainly cannot be barred by the Feldman doctrine. See Johnson v. De Grandy, 114 S.Ct. 2647, 2654 (1994); Schneider, 917 F.2d at 629 ("Moreover, a contrary conclusion on the nature of the 1986 Rule would have little impact on this litigation because only two of the plaintiffs were parties in the state court; thus, even if jurisdiction were improper as to them, the case would continue on behalf of the remaining plaintiffs"); In Re Justices of the Supreme Court of Puerto Rico, 695 F.2d

17, 26 (1st Cir. 1982); and Leaf v. Supreme Court of State of Wisconsin, 979 F.2d at 597, 98.

Aside from the many conflicts with decisions of the Supreme Court and courts of appeal discussed above, the holding of the Fifth Circuit presents a question of exceptional importance. The Court, we respectfully submit, should grant writ to clarify what is meant by "inextricably intertwined". When a court, such as the Fifth Circuit in this case, can utilize that seemingly benign phrase to shut the federal courthouse door in the face of a general constitutional challenge under the civil rights laws, a great injustice has occurred and the civil rights jurisdiction of the federal courts has been improperly narrowed.

II. The Implied Holding Of The Fifth Circuit - That The Federal

Courts Cannot Assume Jurisdiction Over Constitutional Issues That The State Courts Failed or Refused To Adjudicate or That Could Not Have Been Adjudicated In The State Court - Is Contrary To Supreme Court Decisions, and Decisions Of Other Circuit Courts of Appeals And Presents A Question Of Exceptional Importance.

In Howlett By and Through Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430 (1990), the Court held that "a state court may not deny a federal right . . . in the absence of 'valid excuse'. . . An excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source". 110 S. Ct. at 2440. The Court in Howlett expressly held that federal law includes civil rights claims under

the U.S. Constitution, in that case involving rights under the Fourth and Fourteenth Amendments.

Several courts of appeals have held that, if the state courts fail or refuse to adjudicate constitutional issues, or for some reason (such as the fact that they were not discernible at the time of the state court proceedings) they could not be "fully and fairly" adjudicated in the state courts, the federal courts have jurisdiction to adjudicate such constitutional claims because the failure of the state courts to adjudicate them is in itself a violation of due process. Wind v. Orange County, 715 F. 2d, 1543 (11th Cir., 1983) cert. den. 467 U.S. 1210 (1984); Robinson v. Ariyosh, 753 F. 2d, 1460, 1472 (9th Cir., 1975) vac. on other gnds., 477 U.S. 902 (1986), holding

that, because "the Hawaii Supreme Court refused to consider Robinson's federal claims" the federal court had jurisdiction); Lynk v. LaPorte Superior Court No. 2, 785 F. 2d 554, 564-65 (7th Cir., 1986); and see Sims v. Moore, 99 S. Ct. 2376, 2378 (1979); Haring v. Prosier, 103 S. Ct. 2360, 2373 (1983); 42 Rutgers Law Review at pp. 883-84;[14] and Black v. Cook County Officers Electorial Board, 750 F. Supp. 901, 903 (N.D. Ill. 1990).

All of these holdings directly conflict with the effective holding of

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[14]". . . There is a difference between asking a federal court to review the merits of a state court judgment and asking a federal court to enjoin procedures for enforcement of a state court judgment that allegedly denied the state court defendant due process and equal protection. Justice Brennan recognized this distinction by interpreting the scope of 'inextricably interwined' with the standard of 'separable from and collateral to'".

the Fifth Circuit in this case - that, despite the fact that the state courts failed and refused to consider and adjudicate petitioner's First Amendment claim (violation of free speech) and his Fourteenth Amendment claim (discriminatory and/or selective prosecution), the federal court had no jurisdiction.

C. The First Amendment Claim

As to the First Amendment claim, the communications that were the basis of the three-year suspension, all made it clear that neither the petitioner nor the team of lawyers with whom he worked would discuss employment or accept cases except through the personal lawyer or solicitor of the survivors of the victims. Thus, any dealings concerning employment would have been held only with sophisticated

lawyers and solicitors who could distill and understand the written communications and subsequent oral representations of petitioner or the members of his team and make an informed decision for the potential client as to whether he or she should employ petitioner and his team and participate in the litigation in the United States.

There is no doubt but that the three communications in questions were protected by the First Amendment. In Bates v. Arizona State Bar, 433 U.S. at 383, nte. 37, the Court held that a state cannot, in the face of the First Amendment, regulate speech of an attorney which seeks an audience with those who are "legally sophisticated", such as solicitors or other attorneys; Spencer v. Honorable Justices of Supreme Court of

PA, 579 F. Supp. 880 (E.D. Pa. 1984) aff'd 760 F. 2d 261 (3rd Cir. 1985);[15] and Matter of Jacques, 407 Mich. 26, 291 N.W. 2d 469 (1976).

The state trial judge ignored the First Amendment claims; the state court of appeal finessed the issue;[16] the Texas

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[15]In Spencer, the court, citing Bates, stated that "(l)awyers are capable of understanding, evaluating, and distilling legal advertisements and thus prohibiting plaintiff from making representations . . . to other lawyers is unnecessary to advance any state interest and therefore unconstitutional." 579 F. Supp. at 892.

[16]The State court of appeals stated: "Accepting the (Texas) Supreme Courts inherent power to adopt the rule (DR 2-101, the advertising rule), it is not our function as an intermediate appellate court to nullify or alter it (on constitutional grounds), for once the Court decides on a rule of law, the decision is, in the absence of a controlling decision by the United States Supreme Court, binding on lower courts until the Court changes the rule." 786 S.W. 2d at 441. In the first place, petitioner had contended that, under Supreme Court precedent, specifically

Supreme Court denied writ of error without an opinion, and this Court denied writ of certiorari without an opinion. 111 S. Ct. 2891 (1988). Thus, to this date, no state court has "fully and fairly" adjudicate the First Amendment issue, thus depriving petitioner of his due process rights under the Fourteenth Amendment.

b. Discriminatory and/or Selective Prosecution

Bates v. Arizona, either Rule 2-101 was unconstitutional as applied or, if intended to permit abridgement of free speech directed to a "sophisticated audience", then it was unconstitutional as written. Yet the Texas court of appeals still refused to do its duty and address the issue. Whether or not the Texas court of appeals was correct in its claim that it and all lower courts, including the trial court, were compelled by the Texas supreme court to abstain from deciding the constitutionality of DR-2-101 as written or applied, the fact remains that the Texas state courts did not give petitioner his day in court on that very important constitutional issue.

As noted above, there is overwhelming evidence that petitioner was the target of a vicious vendetta and discriminatory prosecution in violation of the Equal Protection clause. The complaint filed in this case outlines this sorry saga of selective and discriminatory prosecution. See pars. 3.10 through 3.43 of the Complaint, App. E; pars. 5.1 through 5.4 and the Prayer.

Many of the essential facts with reference to discriminatory prosecution did not materialize or become known until <u>after</u> the state court had entered the suspension judgment against petitioner - e.g. O'Quinn's sweetheart settlement; the preferential treatment given Schechter; the fact that the Bar was not going to prosecute Newman (as noted above, the statute did not run on Newman in 1992);

and the fact that none of the other 17 lawyers which the Bar said it was targeting were ever charged.

Even so, petitioner, when word of O'Quinn's sweetheart deal leaked, filed a Supplemental Brief in the state court of appeals with respect to discriminatory prosecution, but the court of appeals flatly refused to accept the Brief and a reading of the court of appeals' opinion discloses that the court, as had Judge Casseb, completely ignored the discriminatory prosecution issues.

Discriminatory prosecution in state bar disciplinary matters is an insidious evil. Usually, as in Texas, the highest court in the state adopts and enforces the disciplinary rules and, once a lawyer is charged, there is always the danger that the trial and appellate court judges

will be intimidated by the legal establishment into adversarially joining the fray against that lawyer. That is what happened here. Both Judge Casseb and the Texas court of appeals became willing tools in a state court process that was a "kangaroo court" from start to finish. And, as is averred in the class action allegations in this case, the weak members of the Bar (power-wise), such as solo practitioners, are victimized and the powerful members (the big law firms and the elites who control the plaintiffs' Bar) are immunized. To paraphrase those great words in Brown v. Board of Education, 74 S. Ct. 686, 692 (1954), ("separate and equal is inherently unequal"), a Bar Association that disciplines itself (instead of having a public entity such as the

Attorney General's office do it) is inherently discriminatory. See article in Lawyers Weekly U.S.A. by Michele Bates Deakin, dated July 19, 1993 (93 LWUSA 285), entitled "Discipline Targets Small Firm Lawyers.

This case is much like the situation before the court in Ciechon v. City of Chicago, 686 F. 2d 511 (7th Cir. 1982). There two paramedics employed by the City of Chicago were called to a home where a man complained of chest pains. They did not take him to the hospital and shortly thereafter he died at home. The relatives complained to the City. The City disciplined and dismissed one (Ciechon) and did nothing to the other (Ritt). The Court stated:

> "By so misusing its own procedures and by permitting itself to be so manipulated by the family, the City (of

Chicago) deprived Ciechon of due process of law. Olschock v. The Village of Skokie, 541 F. 2d 1254, 1257-58 (7th Cir. 1976) . . . all these irregularities add up to a case slanted from the start against plaintiff, heard by a kangaroo court, and denying her due process. . ."

"The disciplinary proceedings against Ciechon also constituted a denial of equal protection of the law because they represented an arbitrary, irrational decision to discriminate among the two paramedics, Ciechon and Ritt, who were equally responsible for the welfare of the patient on all ambulance runs. Thus two persons similarly situated, in that they experienced the same set of circumstances and were equally responsible for patient assessment and treatment, were treated absolutely differently. Ciechon was charged with failure to perform her duties and discharged; Ritt was never charged or disciplined in any fashion. Since the discrimination was intentional, the equal protection clause was violated. United States v. Falk, 479 F. 2d 616, 619 (7th Cir. 1973) (en banc). . .

> Ritt either deserved to be discharged as Ciechon was, or Ciechon, like Ritt, deserved to be completely vindicated of all charges. There was no possible justification for treating them differently."

686 F. 2d at 521, 522, 523.

As noted above, Newman was more heavily involved than petitioner in the Pipes Alpha episode; yet, the Bar condemned petitioner to three years suspension and did not even charge Newman. The Bar has never offered any reason for this disparity in treatment. And the same is true with respect to petitioner and O'Quinn; petitioner and Schechter, and petitioner and the other 17 lawyers initially targeted.

Again, the failure of the state courts to adjudicate this important constitutional issue should have paved the way for the federal court in this

case to assert civil rights jurisdiction. Its refusal to accept such jurisdiction places it four-square in conflict with the authorities cited above and creates a question for review of exceptional importance.

III. The Fifth Circuit's Refusal to Hold That the Federal Courts Had Jurisdiction Over The Claims of Bad Faith, Retaliatory and Harassing Prosecution Again Placed It In Direct Conflict With A Number of Supreme Court and Other Circuit Court Decisions And Again Presents A Question of Exceptional Importance.

Perhaps the most blatantly erroneous statement of the Fifth Circuit is where it states:

> "The *Younger* doctrine, however, does not apply to the present matter. The state proceeding here in question is not ongoing and, thus, no question of intervention is presented."

App. A; 32 F.3d at 948. While it is true that the state proceeding in which

petitioner was condemned to three years suspension is no longer "ongoing", the Fifth Circuit misleadingly ignores the allegations in the complaint that there are other retaliatory and bad faith prosecutions against petitioner that are still "ongoing". See App. E, par. 3.42 and ftne. 8, supra.

There is no doubt that the petitioner adequately alleged the bad faith exception to the Younger doctrine (Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971). The Fifth Circuit conceded as much in its first opinion and did not contradict that view in its second opinion. Compare App. A and App. B. Indeed, the complaint is replete with allegations of bad faith, retaliatory, harassing and discriminatory conduct toward petitioner. See pars. 3.11 - 3.43

(particularly 3.42 quoted above); 4.1 - 4.6; 5.1 - 5.4; 6.1-6.6; 7.1- 7.7 (conspiracy); and Prayer. App. E.

The holding of the Fifth Circuit that the federal courts do not have jurisdiction over petitioners bad faith claims is contrary to many Supreme Court decisions and decisions of other courts of appeals. See Dombrowski v. Pfiester, 380 U.S. 479, 85 S. Ct. 1116,1123 (1965) (establishing the rule that federal courts can issue injunctions against state court proceedings brought in bad faith); Younger, 91 S. Ct. at 752, 746, 749 (holding that the Dombrowski bad faith rule is an exception to the abstention doctrine);[17] Trainor v.

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[17]In its first opinion in this case, the Fifth Circuit correctly analyzed petitioner's bad faith allegations:

"The doctrinal underpinnings of this

Hernandez, 431 U.S. 434, 446, 97 S. Ct., 1911, 1919 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 599-602, 95 S. Ct., 200, 1206-07, 1212 (1975); Gibson v. Berryhill, 93 S. Ct. at 1697 (referring

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> 'bad faith exception' are rooted in the sister exception to the Younger doctrine . . . Younger does not apply to the present matter. . . (but) . . . (w)e nonetheless have previously borrowed Younger's framework in clarifying when federal courts may or may not become involved in state court decision making.
>
> The bad faith exception applies here. Musslewhite has alleged that the state's judicial machinery was appropriated in an effort to persecute him. Implicit in these allegations is that both the decision and the mechanism itself are not trustworthy. The federal courts must have subject matter jurisdiction if a claim of bad faith and harassment is ever to be proved, for the claim is levied against the proceedings themselves."

25 F. 3d at p. 1306; App. B.

to "bias" of judge or panel as being ground for "bad faith"); Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 677-78, nte. 5 (1978) (making it clear that if Younger only applies where there are ongoing state court proceedings and if, as incorrectly found by the Fifth Circuit, there had been no on-going proceedings, the federal court would have, with even greater force, jurisdiction to address whether the judgment in the prior adjudicated case was the product of bad faith; McCune v. Frank, 521 F. 2d 1152 (2nd Cir.) 1158 (1975) (holding that "Younger presupposes the existence of a competent state forum. . . "; thus, if Judge Casseb was biased and/or the bad faith of the State Bar permeated the proceedings, the petitioner can attack the prior, completed

proceedings on the ground that they were the product of bad faith); Kercado - Malendez v. Aponte -Rogue, 829 F. 2d 255, 264 (1st Cir. 1987) ("political motive" can constitute bad faith and "may be shown by circumstantial evidence"); Matter of National Hospital & Institutional Bldg., 658 F. 2d 39, 44 (2nd Cir. 1981) defines "bad faith", sufficient for the Younger exception to apply, as consisting of "flagrant constitutional" violations; that the "state forum is biased"; that the prosecuting agency [the City in that case] "acted in willful disregard of the law"; that such agency "clearly abused its discretion in initiating proceedings"; or that the "state proceeding [was] motivated by a desire to harass . . . by ill will, or by any other

improper motivation"); Central Avenue News, Inc. v. City of Minot, 651 F. 2d 565 (8th Cir. 1981); Timmerman v. Brown, 528 F. 2d 811, 815 (4th Cir., 1975).

It is absolutely clear that the Fifth Circuit erred in not accepting jurisdiction with regard to the bad faith claims of petitioner; in not determining whether the ongoing state proceedings were the product of bad faith; and whether the court should have enjoined the ongoing state court proceedings.

In addition to the fact that the holding of the Fifth Circuit is in direct conflict with Supreme Court and other circuit court law, the bad faith exception is a very important part of this nation's body of civil rights law and the Court, we respectfully suggest, should grant writ in order to make it

clear that the bad faith exception must be honored and jurisdiction accepted when facts are alleged such as those alleged in this case.[18]

IV. Certiorari Is Appropriate With Respect To The Action Of The Fifth Circuit In Issuing A New Opinion More Than 21 Days After its Earlier Opinion.

Rule 41(a), F.R.A.P. states that the "mandate of the court shall issue 21 days after the entry of judgment....". While Rule 41 provides that the court of appeals can shorten or enlarge the time for issuing the mandate, the courts of

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[18] In Mitchum v. Foster, 407 U.S. 225 (1972), the Supreme Court stated that "the very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" pp. 915, 916 of Rutgers. See also Miofsky v. Superior Court, 703 F.2d 332, 335 (9th Circ. 1983).

other circuits have held that this can "only" be done "upon the same exceptional circumstances justifying a recall of the mandate." Adamson v. Lewis, 955 F.2d 614, 619 (9th Cir. 1992); Zipfel vs. Halliburton, 861 F.2d 565, 567 (9th Cir. 1988) (power to stay or recall mandates is not unlimited; it can be exercised only upon a showing of "good cause" or "exceptional circumstances"); Powers v. Bethlehem Steel Corporation, 483 F.2d 963, 964 (1st Cir. 1973) ("(a)lleged erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment..."); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277-280 (D.C. Cir. 1971) cert. den. 92S.Ct. 2642 (1972) (mandate may not be stayed or recalled simply because the court of

appeals later changes its mind); and Bryant v. Ford Motor Company, 886 F.2d 1526 (9th Cir. 1989).[19]

In this case, the Fifth Circuit, long after the 21 days had expired, simply changed its mind; withdrew its earlier opinion and substituted another without "good cause" or "exceptional circumstances". The power of the court to do this deserves consideration by this court.

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[19] The Sixth Circuit explained the rationale underlying this requirement:

> "In order to constitute good cause shown under the rule (Rule 41), there must be exceptional circumstances shown, which in the opinion of the court are sufficient to override the strong public policy that there should be an end to a case in litigation."

Hines v. Royal Indemnity Co., 253 F.2d 171 (6th Cir. 1958).

WHEREFORE, petitioner requests the Court to grant certiorari in this case for all the reasons stated above.

Respectfully submitted,

Benton Musslewhite
440 Louisiana, Suite 1520
Houston, Texas 77002
(713) 222-2288
FAX NO. (713) 222-0319

Pro Se and as Attorney for the Putative Class

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BENTON MUSSLEWHITE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

Appendices To Petition For Writ of Certiorari

Benton Musslewhite
1520 Lyric Office Centre
440 Louisiana
Houston, Texas 77002
Telephone (713) 222-2288
Facsimile (713) 222-0319

Pro Se/Lead Counsel for
Petitioners

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APPENDIX A

Benton MUSSLEWHITE, and all others similarly situated, Plaintiff-Appellant,

v.

The STATE BAR OF TEXAS, et al, Defendants-Appellees.

No. 92-2762

United States Court of Appeals
Fifth Circuit

Sept. 23, 1994

Attorney brought civil rights action against Texas State Bar and its officials, challenging constitutionality of procedures used in disciplinary proceeding. The United States District court for the Southern District of Texas, David Hittner, J., dismissed action for lack of subject matter jurisdiction, and attorney appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) district court lacked subject matter jurisdiction over attorney's claim

against state bar attacking some aspects of disciplinary proceedings against him; (2) attorney's claim that state bar violated constitutional guarantee of equal protection by selectively investigating attorney and others similarly situated was attack on state bar's procedures as applied to attorney and was outside of district court's jurisdiction; and (3) Younger doctrine did not permit district court to exercise jurisdiction over attorney's claim that state bar's prosecution of him was taken in bad faith for purpose of harassing him.

Affirmed.

Benton Musslewhite, pro se

Linda A. Acevedo, D. Craig Landin, Austin, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

WISDOM, Circuit Judge.

The Court withdraws the opinion issued in this case dated July 19, 1994, and appearing at 25 F.3d 1300, and substitutes the following.

This case presents a question of subject matter jurisdiction. The district court held that it was without jurisdiction to proceed on the appellants claims. We uphold that determination and, accordingly, we affirm.

I.

We limit our discussion of the facts to those bearing on the issue of jurisdiction. The plaintiff/appellant, Benton Musslewhite, is a Houston attorney who made a name for himself representing plaintiffs in complex personal injury

cases, usually involving mass disasters. In 1987, he attracted the attention of the State Bar of Texas ("State Bar") as the result of his public statements soliciting clients. Typically, it seems, Musslewhite held "press conferences" during which he would announce his plan of action in response to a particular tort and detail his qualifications. Not incidentally, he rarely failed to include information on how potential clients could reach him if interested in his services.

The State Bar expressed concern-Musslewhite charges that this concern was feigned-that these press conferences constituted the improper solicitation of clients. The State Bar launched an investigation that focused in large part on whether Musslewhite was violating the

mandates of professional responsibility.[1] Musslewhite perceived the investigation as a direct assault on his First Amendment right to free speech.

Eventually, the State Bar filed formal charges against Musslewhite. The two parties reached a settlement, however, and a trial was unnecessary. Under the terms of the settlement, Musslewhite was suspended from the practice of law for ninety days beginning November 1, 1988, and placed on probation for three years after that. Moreover, he was barred from accepting new employment until November 1, 1988 (the date his suspension was to begin). As to this final limitation, however, Musslewhite still was entitled to refer potential

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[1] Musslewhite charges that the investigation was designed only to harass plaintiff's attorneys and sole practitioners.

clients to other attorneys. The penalty for violation of any of these terms is an automatic three year suspension.

The issue presented in this case stems from an alleged breach of these settlement provisions. On the heels of an oil platform explosion in Scotland, Musslewhite went to work, plotting his strategy for cashing in on the disaster.[2] He held his typical press conferences and issued his self-laudatory press releases.

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his probation.[3] Pursuant to the settlement terms, Musslewhite was suspended from the practice of law for three years beginning January 31, 1989. That judgment was affirmed on appeal.[4] Neither the Texas Supreme Court nor the U.S. Supreme Court found persuasive reasons to reexamine the matter.

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[3] The State Bar considered Musslewhite's press release misleading. For one, the press release failed to disclose Musslewhite's legal handicap which prohibited him from accepting new clients. The State Bar also objected to a letter written by Musslewhite associate Kelly Newman addressed to "all victims or families of victims". This letter extolled the virtues of Musslewhite's group which boasted "internationally renowned trial lawyers in the United States". We underscore that, in this case, we are not testing the validity of these justifications for the State Bar's actions.

[4] Musslewhite v. State Bar of Texas, 786 S.W.2d 437 (Tex.App.-Houston [14th Dist.] 1990, writ denied), cert. denied, 501 U.S. 1251, 11 S.Ct. 2891, 115 L.Ed.2d 1056 (1991).

Having reached a dead end, Musslewhite filed the present suit-an action under 42 U.S.C. Sec. 1983-in federal court against the State Bar, its Executive Director, its General Counsel, its former General Counsel, an attorney employed by the State Bar, and the members of the State Bar's Board of Directors.[5] In his complaint, he alleged

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[5] In his original complaint, Musslewhite named Karen R. Johnson, Executive Director of the state Bar (sued in her official capacity); James M. McCormack, general Counsel for the State Bar (official capacity); Steven Peterson, then general counsel to the State Bar (individual and official capacities); Steven Smoot, then an attorney employed by the State Bar (individual and official capacities) and the Board of Directors (all sued in their official capacities); Charles R. Dunn, Harriet Miers, James N. parsons, Tom Cunningham, Richard C. Hile, Antonio Alvarado, Charles A. Beckham, Marsha S. Dickie, M. Colleen McHugh, Steven L. Martin, Charles O'Reilly, Spender C. Relyea, Jerry Secrest, and Kirk Watson.

We refer to the defendants collectively as the "State Bar". We note, however, that the State Bar of

first, that several of the procedures used in his disciplinary proceeding were unconstitutional and, second, that some of the State Bar's rules themselves are unconstitutional. He sought declaratory and injunctive relief, and compensatory and punitive damages. He feels strongly that he is a victim of the State Bar's desire to persecute him, allegedly in retaliation for his willingness to use the right of free speech to enhance his professional stature.

II.

The district court dismissed Musslewhite's suit for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. We address whether the district court

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Texas is a distinct entity that Musslewhite named as a defendnat in his prayer for a declaratory judgment.

erred in so doing. After a de novo review,[6] we uphold the district court's dismissal of the appellant's challenges to a series of Texas State Bar practices as applied to him as well as his challenges to the constitutionality of the proceedings.

III.

We start with two decisions that inform our analysis: the U.S. Supreme Court's decision in District of Columbia Court of Appeals v. Feldman[7] and this Court's decision in Howell v. State Bar of Texas[8]. Because they control most of

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[6] In re Bradley, 989 F.2d 802, 804 (5th Cir. 1993).

[7] 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

[8] 710 F.2d 1075 (5th Cir. 1983) cert. denied 466 U.S. 950, 104 S.Ct. 2152, 80 L.Ed.2d 538 (1984) ("Howell II").

the issues, we discuss them in some detail.

The Feldman case involved an apparently qualified applicant to the District of Columbia bar who, in spite of his qualifications, had not graduated from an accredited law school. The bar refused him admission, citing the rule requiring a completed legal education from an accredited law school. Feldman responded with a petition to the D.C. Court of Appeals for a waiver of the graduation requirement. That petition was denied.

Feldman sought relief in federal district court. The court never reached the merits of Feldman's contentions, however, because it held that the federal courts were without the predicate subject matter jurisdiction. The court reasoned that the D.C. Court of Appeals's

refusal to grant Feldman a waiver was a decision by a body tantamount to a state's highest tribunal. The federal courts may not properly sit in review of such decisions.

Feldman appealed. The Court of Appeals for the D.C. Circuit disagreed with the district court and, instead, concluded that the bar criteria proceedings in the D.C. Court of Appeals were administrative and not judicial. This distinction, as we explain below, allowed the federal district court to proceed. Accordingly, the court reversed and remanded the case. Before it went back to the district court, the U.S. Supreme Court granted certiorari.

The Supreme Court held that the district court had it right the first time. First, the Court settled the nature of the bar disciplinary

proceedings as judicial, not merely administrative. The court reasoned that the purpose of the proceedings was to "investigate, declare, and enforce liabilities as they [stood] on present or past facts and under laws supposed already to exist").[9] That, the Court concluded, is a judicial charge.

The Court then turned its attention to the question of the district court's jurisdiction to entertain Feldman's challenges. The Court drew a significant distinction between Feldman's broad-based challenges to the constitutionality of the bar's rules and his challenges to the constitutionality of his individual disciplinary proceedings. This distinction reflects the rule embodied in

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[9] Feldman, 460 U.S. at 479, 103 S.Ct. at 1313 (internal quotations omitted).

28 U.S.C. Sec. 1257: Only the Supreme Court of the United States may review final judgments or decrees rendered by the highest court in a state.

[1,2] The Feldman rule, then, is as follows. The federal courts do have subject matter jurisdiction over

> general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state-court judgment in a particular case.[10]

These we refer to as "general constitutional attached." The federal courts do not have subject matter jurisdiction over

> challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state

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[10] Id at 486, 103 S.Ct. at 1317 (emphasis added).

court's action was unconstitutional.[11]

We applied the Feldman rule in the Fifth Circuit for the first time in Howell v. State Bar of Texas. In that case, Howell, a Texas attorney, had filed suit in federal district court to enjoin his disbarment.[12] The district court had

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[11] Id. Feldman was based upon Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), in which the Supreme Court held that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments. Although the doctrine that embodies that principle, is commonly called the "Rooker-Feldman doctrine", we cite to Feldman alone because the instant case is directly within Feldman's factual and legal embed.

[12] In a factual distinction to the case we decide today. Howell sought the injunction first while the State proceedings were pending and again before his state court appeal had been heard. Eventually, the Texas courts finalized their judgment against Howell. At that point, he sought to enjoin the enforcement of his disbarment. Howell v. State Bar of Texas, 674 F.2d 1027 (5th Cir. 1982) (before remand) ("Howell I").

held that it lacked jurisdiction. We reversed in Howell I on grounds irrelevant to this matter and remanded. In the interim, the Supreme Court decided Feldman and, subsequently, vacated our decision in Howell I and remanded the case back to us. We then applied the Feldman rule for the first time. Although we held that dismissal was proper as to the bulk of Howell's claims, we reversed as to Howell's due process, equal protection, and privileges and immunities claims.[13]

We also fleshed out some of the rules announced in Feldman. For one, the Feldman distinction meant that a general constitutional attack that is nonetheless "inextricably intertwined" with a state court judgment of reprimand cannot be

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[13] Howell II, 710 F.2d at 1076.

properly heard in federal court.[14] Second, we noted that federal jurisdiction does not lie for claims that were not presented first to the state court in the disciplinary proceeding.[15]

Our task, then, is focused: Are any of Musslewhite's claims properly construed as general constitutional attacks on the Texas State Bar disciplinary scheme. The district court concluded that all of Musslewhite's claims were challenges to the constitutionality of the State Bar's

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[14] Id. at 1077.

[15] Id. at 1076; Thomas v. Kadish, 748 F.2d 276, 277-78 (5th Cir. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985). Feldman overruled the "Dasher exception" previously embodied in Dasher v. Supreme Court of Texas, 658 F.2d 1045 (5th Cir. 1981). After Feldman, the federal courts are without jurisdiction over a plaintiff's claims that could have been raised, but were not.

practices as applied to him in his disciplinary proceedings. We agreed with the sound reasoning of the district court and its classification of all of Musslewhite's claims.

IV.

[3] We turn to the specific claims that Musslewhite raises. He complains that:

(1) The state judge erred in denying Musslewhite's motion for a change of venue;

(2) The state trial denied Musslewhite's right to trial by jury;

(3) The Texas Court of Appeals, Texas Supreme Court, and U.S. Supreme Court all erred in refusing to expedite Musslewhite's appeal of the disciplinary proceeding;

(4) The State Bar's rule governing the making of false and misleading statements is unconstitutional as applied in Musslewhite's case;

(5) "[S]everal constitutional travesties ... occurred in the state court action";

(6) The suspension imposed in the state trial constituted a violation of Musslewhite's First Amendment rights;

(7) The punishment imposed in the state trial was excessive;

(8) Musslewhite's state trial was tainted by prejudicial publicity;

(9) Musslewhite received inadequate notice of the state trial;

(10) The court refused to suspend Musslewhite's judgment upon his

filing a supersedeas bond while appealing.

We will not belabor our conclusions with a claim-by-claim analysis. All of these contentions have in common their grounding in some aspect of the disciplinary proceedings against Musslewhite. It is plain by the way they are stated that they attack aspects of his particular trial. We have stated that "the Texas scheme for disciplining attorneys is fully capable of considering the constitutional arguments of attorney-defendants relating to specific procedures followed in their cases."[16] To evaluate them would require a review of the state court judgment. That, as Feldman instructed, we are without the jurisdiction to do.

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[16] Bishop v. State Bar of Texas, 736 F.2d 292, 294 (5th Cir. 1984).

V.

Musslewhite couched some of his averments in the language of a general constitutional attack on the state Bar's scheme of disciplining attorneys. Merely using catch phrases, however, will not vest the federal district court with the jurisdictional authority to entertain the action. This is about substance, not form. Instead, we must ascertain what the court really is being asked to review.

[4] First, Musslewhite complains that the State Bar violated the constitutional guarantee of equal protection by selectively investigating himself and others similarly situated. We have no trouble classifying this contention as but another attack on the State Bar's procedures as applied to Musslewhite. All of the evidence to

which Musslewhite alludes goes solely to his disciplinary proceeding. That is, the procedures, he charges, were used in this case to deprive him of his equal protection rights. This conclusion applies as well to his charge that the State Bar prosecutes sole practitioners for conduct that it tolerates by large firms. The state court was capable of resolving that claim; it too is inextricably intertwined with the state case.

[5] Musslewhite also argues that the State Bar rule governing the making of false and misleading statements is, on its face, unconstitutionally vague and violates the First Amendment. The Texas Court of Appeals flatly rejected this contention that the rule was unconstitutionally vague either on its face or as applied in Musslewhite's

case.[17] The district court's judgment that it was incapable of revisiting that sound judicial decision was correct.

[6] Last, Musslewhite contends that the State Bar's entire prosecution was taken in bad faith and for the purpose of harassing him. Although he makes strong and serious allegations, our consideration of these contentions would require a collateral examination of the state court judgment. That we cannot do.

Musslewhite urges that we recognize n exception to the Feldman doctrine for an allegation that the prosecution was taken in bad faith. In Younger v. Harris[18], the Supreme Court established a policy whereby federal intervention in

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[17] Musslewhite, 786 S.W.2d at 441-42.

[18] 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

ongoing state criminal proceedings is barred absent extraordinary circumstances. Subsequent decisions teach us that a state prosecution taken in bad faith or for the purposes of harassment constitutes such extraordinary circumstances and federal intervention is justified.[19] This bad faith exception to the Younger doctrine has two recognized applications in our Circuit; First, where the state prosecution is taken for the purpose of deterring constitutionally protected conduct[20] and, second, where the prosecution is motivated by a design to harass the defendant.[21]

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[19] See Trainor v. Hernandez, 431 U.S. 434, 446, 97 s.Ct. 1911, 1919, 52 L.Ed.2d 486 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 611-12, 95 S.Ct. 1200, 1211-12, 43 L.Ed.2d 482 (1975).

[20]

[21]

The Younger doctrine, however, does not apply to the present matter. The state proceeding here in question is not ongoing and, thus, no question of intervention is presented. The Younger doctrine is rooted in different policy considerations than the Feldman doctrine, and we do not recognize an exception for allegations of bad faith to the latter. Instead, as we recently stated, when facts with similar circumstances, "We do as we must."[22] We dismiss.

AFFIRMED.

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APPENDIX B

Benton MUSSLEWHITE, and all others similarly situated, Plaintiff-Appellant,

v.

The STATE BAR OF TEXAS, et al, Defendants-Appellees.

No. 92-2762

United States Court of Appeals, Fifth Circuit.

July 19, 1994

Attorney brought civil rights action against State Bar of Texas, its officials, its employee, and its board of directors, challenging constitutionality of procedures used in attorney's state disciplinary proceeding and of state bar's rules, and alleging bad faith and harassment. The United States District Court for the Southern District of Texas, David Hittner, J., dismissed action for lack of subject matter jurisdiction. On review, the Court of Appeals, Wisdom,

Circuit Judge, held that (1) district court lacked subject matter jurisdiction over attorney's claims which were grounded in or inextricably intertwined with attorney disciplinary proceedings; (2) district court lacked jurisdiction over attorney's claims that state bar rule governing making of false and misleading statements was unconstitutionally vague on its face and violated First Amendment; and (3) bad faith exception to general rule, barring federal intervention in ongoing state proceedings absent extraordinary circumstances, applied respecting bad faith and harassment claim.

Affirmed in part, reversed and remanded in part.

Benton Musslewhite, pro-se

Linda A. Acevedo, D. Craig Landin, Austin, TX, for appellees.

Appeal from the United States District court for the Southern District of Texas.

Before WISDOM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

WISDOM, Circuit Judge:

This case presents a question of subject matter jurisdiction. The district court held that it was without jurisdiction to proceed on the appellant's claims. We uphold that determination with one exception. Accordingly, we affirm in part and reverse and remand in part.

I.

We limit our discussion of the facts to those bearing on the issue of jurisdiction. The plaintiff/appellant, Benton Musslewhite, is a Houston attorney who made a name for himself representing plaintiffs in complex personal injury cases, usually involving mass disasters. In 1987, he attracted the attention of

the State Bar of Texas ("State Bar") as the result of his public statements soliciting clients. Typically, it seems, Musslewhite held "press conferences" during which he would announce his plan of action in response to a particular tort and detail his qualifications. Not incidentally, he rarely failed to include information on how potential clients could reach him if interested in his services.

The State Bar expressed concern-Musslewhite charges that this concern was feigned-that these press conferences constituted the improper solicitation of clients. The State Bar launched an investigation that focused in large part on whether Musslewhite was violating the mandates of professional responsibility.[1]

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Musslewhite perceived the investigation ad a direct assault on his First Amendment right to free speech.

Eventually, the State Bar filed formal charges against Musslewhite. The two parties reached a settlement, however, and a trial was unnecessary. Under the terms of the settlement, Musslewhite was suspended from the practice of law for ninety days beginning November 1, 1988, and placed on probation for three years after that. Moreover, he was barred from accepting new employment until November 1, 1988 (the date his suspension was to begin). As to this final limitation, however, Musslewhite still was entitled to refer potential clients to other attorneys. The penalty for violation of any of these terms was

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The issue presented in this case stems from an alleged breach of these settlement provisions. On the heels of an oil platform explosion in Scotland, Musslewhite went to work, plotting his strategy for cashing in on the disaster.[2] He held his typical press conferences and issued his self-laudatory press releases.

The State Bar concluded that his tactics violated the terms of the settlement agreement, and sued to revoke his probation.[3] Pursuant to the

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[2] On July 6, 1988, the Piper Alpha oil platform in the North Sea exploded. Musslewhite flew to Scotland shortly thereafter to discuss a possible lawsuit over the incident in the state courts of Texas. He was in touch with John O'Quinn, another attorney whom the State Bar had investigated, about referring any cases he obtained in Scotland to O'Quinn.

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Having reached a dead end, Musslewhite filed the present suit-an action under 42 U.S.C. Sec. 1983-in

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which prohibited him from accepting new clients. The State Bar also objected to a letter written by Musslewhite associate Kelly Newman addressed to "all victims or families of victims". The letter extolled the virtues of Musslewhite's group which boasted "internationally renowned trial lawyers in the United States". We underscore that, in this case, we are not testing the validity of these justifications for the State Bar's actions.

[4] Musslewhite v. State Bar of Tex., 758 S.W.2d 437 (Tex.App.-Houston [14th Dist.] 1990, writ denied), cert. denied, 501 U.S. _____, 111 s.Ct. 2891, 115 L.Ed.2d 1056 (1991).

federal court against the State Bar, its Executive Director, its General Counsel, its former General Counsel, an attorney employed by the State Bar, and the members of the State Bar's Board of Directors.[5] In his complaint, he alleged first, that several of the procedures

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[5] In his original complaint, Musslewhite named Karen R, Johnson, Executive Director of the State Bar (sued in her official capacity); James M. McCormack, general Counsel for the state Bar (official capacity); Steven Peterson, then general counsel to the State Bar (individual and official capacities); Steven Smoot, then an attorney employed by the State Bar (individual and official capacities); and the Board of Directors (all sued in their official capacities); Charles R. Dunn, Harriet Miers, James N. Parsons, Tom Cunningham, Richard C. Hile, Antonio Alvarado, Charles A. Beckham, Martha S. Dickie, M. Colleen McHugh, Steven L. Martin, Charles O'Reilly, Spencer C. Reylea, Jerry Secrest, and Kirk Watson.

We refer to the defendants collectively as the "State Bar". We note, however, that the State Bar of Texas is a distinct entity that Musslewhite named as a defendnat in his prayer for a declaratory judgment.

used in his disciplinary proceeding were unconstitutional and, second, that some of the State Bar's rules themselves are unconstitutional. He sought declaratory and injunctive relief, and compensatory and punitive damages. He feels strongly that he is a victim of the State Bar's desire to prosecute him, allegedly in retaliation for his willingness to use the right of free speech to enhance his professional stature.

II.

The district court dismissed Musslewhite's suit for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. We address whether the district court erred in so doing. After a de novo review[6], we uphold the district court's

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[6] In re Bradley, 989 F.2d 802, 804 (5th Cir. 1993).

dismissal of the appellant's challenges to a series of Texas State Bar practices as applied to him. We hold, however, that Musslewhite has stated a claim upon which relief could be granted as to his allegations of bad faith and harassment. The district court did have jurisdiction over that claim and should have proceeded on that basis.

An explication of the way in which Rules 12(b)91) and 12(b)(6) intersect in this case may be helpful. Rule 12(b)91) requires a threshold determination of whether subject matter jurisdiction exists. Sometimes this depends on whether the plaintiff has stated a particular type of federal claim. To make that determination, we look to Rule 12(b)96) which, as is widely understood, deals with dismissal for failure to state a claim upon which relief can be granted.

With that exception this case turns solely on Rule 12(b)(1).

III.

We start with two decisions that inform our analysis: the U.S. Supreme Court's decision in District of columbia Court of Appeals v. Feldman[7] and this Court's decision in Howell v. State Bar of Texas[8]. Because they control most of the issues, we discuss them in some detail.

The Feldman case involved an apparently qualified applicant of the District of Columbia bar who, in spite of his qualifications, had not graduated from an accredited law school. The bar

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Feldman sought relief in federal district court. The court never reached the merits of Feldman's contentions, however, because it held that the federal courts were without the predicate subject matter jurisdiction. The court reasoned that the D.C. Court of Appeals' refusal to grant Feldman a waiver was a decision by a body tantamount to a state's highest tribunal. The federal courts may not properly sit in review of such decisions.

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concluded that the bar criteria proceedings in the D.C. Court of Appeals were administrative and not judicial. This distinction, as we explain below, allowed the federal district court to proceed. Accordingly, the court reversed and remanded the case. Before it went back to the district court, the U.S. Supreme Court granted certiorari.

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already to exist".[9] That, the Court concluded, is a judicial charge.

The Court then turned its attention to the question of the district court's jurisdiction to entertain Feldman's challenges. The Court drew a significant distinction between Feldman's broad-based challenges to the constitutionality of the bar's rules and his challenges to the constitutionality of his individual disciplinary proceedings. This distinction reflects the rule embodied in 28 U.S.C. Sec. 1257: Only the Supreme Court of the United States may review final judgments or decrees rendered by the highest court in a state.

[1,2] The Feldman rule, then, is as follows. The federal courts do have

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[9] Feldman, 460 U.S. at 479, 103 S.Ct. at 1313 (internal quotations omitted).

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> general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state-court judgment in a particular case.[10]

These we refer to as "general constitutional attacks". The federal courts do not have subject matter jurisdiction over

> challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.[11]

We applied the Feldman rule in the Fifth Circuit for the first time in Howell v. State Bar of Texas. In that case, Howell, a Texas attorney, had filed suit in federal district court to enjoin

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[10] Id. at 486, 103 S.Ct. at 1317 (emphasis added).

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his disbarment.[12] The district court had held that it lacked jurisdiction. We reversed in Howell I on grounds irrelevant to this matter and remanded. In the interim, the Supreme Court decided Feldman and, subsequently, vacated our decision in Howell I and remanded the case back to us. We then applied the Feldman rule for the first time. Although we held that dismissal was proper as to the bulk of Howell's claims, we reversed as to Howell's due process, equal protection, and privileges and

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[12] In a factual distinction to the case we decide today, Howell sought the injunction first while the state proceedings were pending and again before his state court appeal had been heard. Eventually, the Texas courts finalized their judgment against Howell. At that point, he sought to enjoin the enforcement of his disbarment. Howell v. State Bar of Texas, 674 F.2d 1027 (5th Cir. 1982) (before remand) ("Howell I").

immunities claims.[13]

We also fleshed out some of the rules announced in Feldman. For one, the Feldman distinction meant that a general constitutional attack that is nonetheless "inextricably intertwined" with a state court judgment of reprimand cannot be properly heard in federal court.[14] Second, we noted that federal jurisdiction does not lie for claims that were not presented first to the state court in the disciplinary proceeding.[15]

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[13] Howell II, 710 F.2d at 1076.

[14] Id. at 1077.

[15] Id. at 1076; Thomas v. Kadish, 748 F.2d 276, 277-78 (5th Cir. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985). Feldman overruled the "Dasher exception" previously embodied in Dasher v. Supreme Court of Texas, 658 F.2d 1045 (5th Cir. 1981). After Feldman, the federal courts are without jurisdiction over a plaintiff's claims that could have been raised, but were not.

Our task, then, is focused: Are any of Musslewhite's claims properly construed as general constitutional attacks on the Texas State Bar's disciplinary scheme. The district court concluded that all of Musslewhite's claims were challenges to the constitutionality of the State Bar's practices as applied to him in his disciplinary proceedings. Although the court's reasoning was sound, we disagree as to the proper classification of one claim in particular.

IV.

[3] We turn to the specific claims that Musslewhite raises. He complains that:

(1) The state judge erred in denying Musslewhite's motion for a change of venue;

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(2) The state trial denied Musslewhite's right to trial by jury;

(3) The Texas Court of Appeals, Texas Supreme Court, and U.S. Supreme Court all erred in refusing to expedite Musslewhite's appeal of the disciplinary proceeding;

(4) The State Bar's rule governing the making of false and misleading statements is unconstitutional as applied in Musslewhite's case;

(5) "[S]everal constitutional travesties ... occurred in the state court action";

(6) The suspension imposed in the state trial constituted a violation of Musslewhite's First Amendment rights;

(7) The punishment imposed in the state trial was excessive;

(8) Musslewhite's state trial was tainted by prejudicial publicity;

(9) Musslewhite received inadequate notice of the state trial;

(10) The court refused to suspend Musslewhite's judgment upon his filing a supersedeas bond while appealing.

We will not belabor our conclusions with a claim-by-claim analysis. All of these contentions have in common their grounding in some aspect of the disciplinary proceedings against Musslewhite. It is plain by the way they are stated that they attack aspects of his particular trial. We have stated that "the Texas scheme for disciplining attorneys is fully capable of considering

the constitutional arguments of attorney-defendants relating to specific procedures followed in their cases."[16] To evaluate them would require review of the state court judgment. That, as Feldman instructed, we are without the jurisdiction to do.

V.

Musslewhite couched some of his averments in the language of a general constitutional attack on the State Bar's scheme of disciplining attorneys. Merely using catch phrases, however, will not vest the federal district court with the jurisdictional authority to entertain the action. This is about substance, not form. Instead, we must ascertain what the court really is being asked to review.

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[16] Bishop v. State Bar of Texas, 736 F.2d 292, 294 (5th Cir. 1984).

First Musslewhite complains that the State Bar violated the constitutional guarantee of equal protection by selectively investigating himself and others similarly situated. We have no trouble classifying this contention as but another attack on the State Bar's procedures as applied to Musslewhite. All of the evidence to which Musslewhite alludes goes solely to his disciplinary proceeding. That is, the procedures, he charges, were used in this case to deprive him of his equal protection rights. This conclusion applies as well to his charge that the State Bar prosecutes solo practitioners for conduct that it tolerates by large firms. The state court was capable of resolving that claim; it too is inextricably intertwined with the state case.

[4] Musslewhite also argues that

the State Bar rule governing the making of false and misleading statements is, on its face, unconstitutionally vague and violates the First Amendment. The Texas Court of Appeals flatly rejected this contention that the rule was unconstitutionally vague either on its face or as applied in Musslewhite's case.[17] The district court's judgment that it was incapable of revisiting that sound judicial decision was correct.

VI.

We turn now to the one claim for which the district court was properly vested with jurisdiction. Musslewhite contends that the State Bar's disciplinary proceedings against him were taken in bad faith in violation of his due process rights. In Bishop v. State

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[17] Musslewhite, 786 S.W.2d at 441-42.

Bar of Texas[18], we stated that

> Although Texas disciplinary proceedings are capable of deciding constitutional challenges to specific procedures, recourse in those proceedings is not a sufficient avenue to remedy the constitutional injury done by bad faith proceedings themselves.

[5] The doctrinal underpinnings of this "bad faith exception" are rooted in the sister exception to the Younger doctrine. In Younger v. Harris[19], the Supreme Court established a policy whereby federal intervention in ongoing state criminal proceedings is barred absent extraordinary circumstances. Subsequent decisions teach us that a state prosecution taken in bad faith or for the purposes of harassment constitutes such extraordinary

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[18] 736 F.2d at 292 (emphasis added).

[19] 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

circumstances and federal intervention is justified.[20] This bad faith exception to the Younger doctrine has two recognized applications in our Circuit: First, where the state prosecution is taken for the purpose of deterring constitutionally protected conduct[21] and, second, where the prosecution is motivated by a design to harass the defendant.[22]

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[20] See Trainor v. Hernandez, 431 U.S. 434, 446, 97 S.Ct. 1911, 1919, 52 L.Ed.2d 486 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 611-12, 95 S.Ct. 1200, 1212, 43 L.Ed.2d 482 (1975).

[21] See Smith v. Hightower, 693 F.2d 359 (5th Cir. 1982).

[22] See Shaw v. Garrison, 467 F.2d 113, 119-21 (5th Cir.), cert. denied, 409 U.s. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972), aff'g, 328 F.Supp. 390, 393-400 (1971). In Shaw, we detailed then District Attorney Jim Garrison's harassing prosecution of Clay Shaw and the bad faith tactics Garrison employed in his zealous investigation of the assassination of President John F. Kennedy. Shaw represents perhaps the paradigm in this Circuit if impermissible

The Younger doctrine does not apply to the present matter, for the state proceeding here in question is neither criminal nor ongoing and, thus, no question of intervention is presented. We nonetheless have previously borrowed Younger's framework in clarifying when federal courts may or may not become involved in state court decisionmaking.[23]

[6] The bad faith exception applies here, Musslewhite has alleged that the

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prosecutorial motives. Garrison used his prosecution of Shaw as a means of procuring public support-financial and otherwise-of his larger investigation into the assassination of the President. See Shaw v. Garrison, 328 F.Supp. at 393-400.

[23] See e.g. Moore v. Sims, 442 U.S. 415, 99 s.Ct. 2371, 60 L.Ed.2d 994 (1979) (borrowing Younger principles for civil proceedings in which important state interests are involved); Henry v. First National Bank of Clarksdale, 595 F.2d 291, 301 (5th Cir. 1979), cert. denied, 444 U.S. 1074, 100 s.Ct. 1020, 62 L.Ed.2d 756 (1980).

state's judicial machinery was appropriated in an effort to persecute him. Implicit in these allegations is that both the decision and the mechanism itself are not trustworthy. The federal courts must have subject matter jurisdiction if a claim of bad faith and harassment is ever to be proved, for the claim is levied against the proceedings themselves.

VII.

[7,8] The next step, after having decided that an allegation of bad faith or harassment is a proper means of invoking federal jurisdiction, is to determine whether Musslewhite has properly stated his claim for the purposes of Rule 12(b)(6). Dismissal under Rule 12(b)96) is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts

in support of his claim which would entitle him to relief."[24] That familiar statement illustrates that the federal courts are properly reticent to dismiss cases for failure to state a claim. Other mechanisms such as summary judgment (Rule 56) and a motion for a more definite statement (Rule 12(e)) are the proper vehicles for narrowing the issues and illustrating the boundaries of a claim.[25] Hence, dismissal is not proper merely because the plaintiff has failed to set out in detail the facts upon which he bases his claim.

[9] Applying these procedural definitions to the present context, we

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[24] Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

[25] Williams v. United Credit Plan of Chalmette, Inc., 526 F.2d 713, 714 (5th Cir. 1976).

conclude that Musslewhite has stated a claim that the proceedings against him were taken in bad faith and motivated by harassment. Comparing the present matter with the Bishop case supports our conclusion. In Bishop, we were satisfied that the admittedly thin record brought the case within the ambit of the liberal Rule 12 standard. Yet, the plaintiff in Bishop had alleged merely that the State Bar's efforts to discipline him spanned a number of years and were taken "in bad faith and for an improper motive."[26]

In the case at hand, the district court properly recognized the distinction created in Feldman but failed to address Musslewhite's claims of bad faith and harassment. We approach this question

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[26] Bishop, 736 F.2d at 295.

with only the record as our side.[27] Musslewhite's pleadings plainly state a claim for bad faith and harassment; most of his complaint presents different shades of exactly that charge. In detail, he charges the State Bar with making him the target of a retaliatory, discriminatory, harassing conspiracy of persecution, to be procured by fraud and duress. We express no comment on the merits of his claims, we hold simply that he must be allowed to go forward.

VIII.

In conclusion, we affirm the Howell construction of the Feldman rule; we

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[27] See GHR Energy Corp. v. Crispin Company, Ltd., 791 F.2d 1200, 1201 (5th Cir. 1986) (Court may not look beyond record on appeal); FRAP 10(a) (record is comprised of papers, exhibits, docket entries, and transcript from the district court proceeding). Unfortunately, this reminder is necessary. Musslewhite burdened the Court

uphold the district court's decision that the federal court's decision with the federal courts are not vested with the subject matter jurisdiction to review Musslewhite's challenges to his state court disciplinary proceeding. Musslewhite, however, sufficiently stated a claim of bad faith and harassment which vested the district court with the jurisdictional authority to proceed.[28]

We AFFIRM the district court's dismissal of all claims save as mentioned; we REVERSE and REMAND that claim to the district court for reconsideration consistent with the foregoing.

28

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

BENTON MUSSLEWHITE, Plaintiff,	)(	
v.	)(	
STATE BAR OF TEXAS,	)(	C.A. NO.
KAREN R. JOHNSON,	)(	H-92-938
JAMES M. McCORMACK,	)(	
STEVEN PETERSON,	)(	
STEVEN SMOOT,	)(	
CHARLES R. DUNN,	)(	
HARRIET MIERS,	)(	
JAMES N. PARSONS,	}{	
TOM CUNNINGHAM,	)(	
RICHARD C. HILE,	)(	
ANTONIO ALVARADO,	)(	
CHARLES A. BEKCHAM,	)(	
MARTHA S. DICKIE,	)(	
M. COLLEEN McHUGH,	)(	
STEVEN L. MARTIN,	)(	
CHARLES O'REILLY,	)(	
SPENCER C. RELYEA,	)(	
JERRY SECREST and	)(	
KIRK WATSON, Defendants.	)(	

FINAL JUDGMENT

This Court contemporaneously grants the motion to dismiss (Document #22) filed by all defendants. Therefore, this

Court ORDERS that judgment be entered in favor of defendants.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this the 25th day of June, 1992.

DAVID HITTNER
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2762

BENTON MUSSLEWHITE, and all
others similarly situated,
Plaintiff-Appellant,

versus

THE STATE BAR OF TEXAS, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) FOR REHEARING EN BANC

(Opinion, 5 Cir., , F.3d)

(December 5, 1994)

Before WISDON, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing is

(are) DENIED and no member of this panel

nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion(s) for Rehearing En Banc is (are) also DENIED.

( ) The Petition(s) for Rehearing is (are) DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion(s) for Rehearing En Banc is (are) also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration(s) of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing(s) en banc is (are) DENIED.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BENTON MUSSLEWHITE, and all others similarly situated,	)(	
Plaintiff	)(	
vs.	)(	C.A. NO. H-92-938
STATE BAR OF TEXAS, KAREN R. JOHNSON, JAMES M. McCORMACK, STEVEN PETERSON, STEVEN SMOOT, CHARLES R. DUNN, HARRIET MIERS, JAMES N. PARSONS, TOM CUNNINGHAM, RICHARD C. HILE, ANTONIO ALVARADO, CHARLES A. BECKHAM, MARTHA S. DICKIE, M. COLLEEN McHUGH, STEVEN L. MARTIN, CHARLES O'REILLY, SPENCER C. RELYEA, JERRY SECREST and KIRK WATSON,	)(	
Defendants.	)(	

PLAINTIFF'S ORIGINAL PETITION

Benton Musslewhite, Plaintiff, and all others similarly situated complain of the State Bar of Texas, Karen R. Johnson, James M. Mccormack, Steven Peterson,

Steven Smoot, Charles R. Dunn, Harriet Miers, James N. Parsons, Tom Cunningham, Richard C. Hile, Antonio Alvarado, Charles A. Beckham, Martha S. Dickie, M. Colleen McHugh, Steven L. Martin, Charles O'Reilly, Spencer C. Relyea, Jerry Secrest and Kirk Watson, all defendants in the capacity or capacities set forth below.

Claims for relief are stated as follows:

1.

Jurisdiction and Venue

1.1 This is an action brought pursuant to 42 U.S.C. Sec. 1983 for vindication of constitutional rights, for declaratory relief, and for an equitable bill of review under the laws of the State of Texas.

1.2 This Court has jurisdiction of the present action by virtue of 28 U.S.C.

Sec. 1771, 1332, and 1343, and its pendant jurisdiction.

1.3 Venue for this action is proper in the Houston Division of the Southern District of Texas, where the claims arose.

1.4 As set out more completely below, Plaintiff seeks certification of a class pursuant to Fed. R. Civ. P. 23.

2.

Parties

2.1 Benton Musslewhite is a resident of Harris County, Texas, and an attorney licensed to practice law in the State of Texas and in certain courts of the United States of America.

2.2 The State Bar of Texas is a public corporation and an administrative agency of the judicial department of the State of Texas. The State Bar of Texas is a party herein only for purposes of

the action in the nature of a bill of review and for declaratory judgment.

2.3 Karen R. Johnson is the executive director of the State Bar of Texas. She is sued in her official capacity.

2.4 James M. McCormack is the general counsel of the State Bar of Texas. He is sued in his official capacity.

2.5 Steven Peterson, at times material to this action, was the general counsel for the State Bar of Texas. He is sued in his individual and official capacities.

2.6 Steve Smoot, at times material to this action, was an attorney employed by the State Bar of Texas. He is sued in his individual and official capacities.

2.7 The Board of Directors of the State Bar of Texas, acting through the

members of its Executive Committee, individually listed below and named in their official capacity, is sued for purposes of equitable relief only:

A. Charles R. Dunn;

B. Harriet Miers;

C. James N. Parsons;

D. Tom Cunningham;

E. Richard C. Hile;

F. Antonio Alvarado;

G. Charles A. Beckham;

H. Martha S. Dickie;

I. M. Colleen McHugh;

J. Steven L. Martin;

K. Charles O'Reilly

L. Spencer C. Relyea;

M. Jerry Secrest;

N. Kirk Watson.

3.

Facts

3.3 Plaintiff was graduated with

honors from the Southern Methodist University in 1954. Plaintiff continued his education and received an LL.M. degree, with honors, from Georgetown University School of Law.

3.2 From 1955 through 1957, Plaintiff also served as a captain in the Judge Advocate General Corps of the United States Army Reserve, for which service Plaintiff was decorated.

3.3 Plaintiff received appointments by President Kennedy as an advisor to the National Council on Physical Fitness in 1961, and as a member of the Advisory Board to the Area Redevelopment Administration in 1962.

3.4 From 1969 to 1970, Plaintiff served as legislative aide and then administrative assistant to then United States Senator Ralph W. Yarborough.

3.5 Plaintiff has been licensed to

practice law in the state of Texas since 1954. Since 1958, with the exception of Plaintiff's service to Senator Yarborough and the period of suspension which is the subject of this action, Plaintiff has been actively engaged in the practice of law.

3.6 Throughout his career at the bar, Plaintiff has specialized in litigation, primarily in behalf of plaintiffs in complex personal injury cases.

3.7 Most particularly, Plaintiff developed special expertise in the representation of foreign workers injured by the torts of American companies in locations outside United States territories. Many of these actions arose from large scale disasters that injured many workers simultaneously.

3.8 Plaintiff has also specialized

in toxic tort litigation. For example, Plaintiff was selected for, and has served on, the court-appointed class management committee for the nationwide class of veterans injured by the effects of Agent Orange.

3.9 Plaintiff has enjoyed singular success in his practice before court of all jurisdictions, including the United States Supreme Court. As a result of this success, Plaintiff has been recognized nationally and internationally as a leader in his chosen area of practice.

3.10 Because of the unique nature of Plaintiff's practice, it occasionally has been necessary for Plaintiff to make public statements, through the medium of press conferences and otherwise, regarding his cases or the rights and options of workers injured by the

negligence of their employers or others. Additionally, a number of Plaintiff's cases, by their nature, were controversial and highly publicized.

3.11 Although Plaintiff enjoyed an absolute rights, as a member of the Bar of this state and by virtue of the First Amendment to the United States Constitution and Article 1 Sec. 8 of the Constitution of Texas to engage in the conduct described above, Plaintiff's actions found disfavor in the eyes of Defendant State Bar of Texas and many of its officials and agents.

3.12 Because of these, and other equally unfounded motives, in 1985, Defendants began an "investigation" of 17 members of the plaintiff's bar in the Houston area. These investigations ostensibly were founded on allegations of improper solicitation of clients.

3.13 Defendants endeavored to publicize the campaign against these lawyers in an effort to discredit the plaintiff's bar generally and certain practitioners specifically. Those attorneys specially targeted by Defendants were members of small or solo practitioner firms engaged in the practice of plaintiff-oriented tort litigation.

3.14 Plaintiff fit into the special class of attorneys unfairly targeted by Defendants, and, because of his success and renown, was a particularly fitting target for Defendants' selective and unfair prosecution.

3.15 Of the 17 attorneys investigated by Defendants, only three ever were charged with misconduct, despite the fact that Defendants well knew of other practitioners guilty of far

more serious infractions than those alleged against Plaintiff.

3.16 of the three attorneys charge by Defendants, Plaintiff was the only one who received a punishment of any significance. Plaintiff was the only one who suffered a substantial impairment of his ability to practice his chosen profession by reason of Defendants' prosecution. Indeed, Defendants specifically selected Plaintiff to be the sole victim of their publicized campaign. For example, Plaintiff has reason to believe and does believe, that Defendant Peterson, contrary to his duties and responsibilities as an official of the State of Texas, attempted to unfairly absolve another attorney charged with Plaintiff from any punishment whatsoever.

3.17 In 1984, Defendant State Bar of Texas filed suit in Harris County

against Plaintiff, seeking disbarment, suspension, or reprimand of Plaintiff because of his alleged neglect of client matters.

3.18 In 1987, Defendant filed a second suit against Plaintiff, again seeking disbarment, suspension or reprimand, alleging that Plaintiff had engaged in improper solicitation of clients. The "neglect" action and the "solicitation" action were joined into one suit, State Bar of Texas v. Benton Musslewhite, Nos. 86-44452 and 87-22402.

3.19 Defendants well knew prior to and after filing suit against Plaintiff that there was no basis for the allegations against Plaintiff. Discovery and investigations conducted in the cases conclusively demonstrated that Plaintiff had neither neglected nor solicited his clients.

3.20 Nevertheless, Defendants persisted in their campaign to obtain a finding of liability against Plaintiff, even if such finding had to be obtained by fraud and duress.

3.21 By November of 1987, Defendants' campaign against Plaintiff had begun to bear fruit. Defendants had used the superior resources and position of the State Bar as an agency of the State of Texas to overcome Plaintiff without regard to the merits of the allegations. As a result, Plaintiff had been forced to expend substantial sums of money in defense of frivolous lawsuits, endure public humiliation, embarrassment and loss of reputation, as a result of Defendants' willingness to try the allegations against the Plaintiff in the public press, and risk suffering the loss of his law practice because of the

impossibility of defending himself and also devoting sufficient attention to the affairs of his clients.

3.22 For these and other reasons, Plaintiff agreed to settle his dispute with Defendants by entry of an agreed judgment. This judgment provided that Plaintiff would be actually suspended from the practice of law for 90 days and would be on probation for three years. The agreement also provided that, for one year following the date of the judgment, Plaintiff would refer all new clients to other attorneys. Finally, the agreement provided that plaintiff's probation could be revoked if Plaintiff violated any disciplinary rule in the future or the probationary terms regarding the referral of new clients.

3.23 Despite the duress suffered by Plaintiff because of Defendants'

unconscionable conduct in presenting and prosecuting its action against Plaintiff, Plaintiff would not have agreed to the above referenced settlement but for the fraudulent conduct and misrepresentations of Defendants.

3.24 The representations, acquiescence, silences (when they had a duty to speak) and other conduct of the Defendants led Plaintiff to reasonably believe that he had agreed with the Defendants that the settlement judgment meant the following:

A. That any future charges of new disciplinary violations would be processed through the appropriate grievance committee and ultimately be determined by a jury of Plaintiff's peers, as guaranteed by the State Bar Rules, prior to the use of such allegations to revoke Plaintiff's

probation.

B. That Plaintiff would continue to be free to exercise his liberties under the First Amendment to the U.S. Constitution, Article 1 Sec. 8 of the Texas Constitution, and his rights as a member of the Bar of this State to hold press conferences in connection with Plaintiff's work on mass disasters.

C. That plaintiff could continue to discuss the joint handling of cases with other lawyers, either in direct communication or through public media.

D. That, in the event of an application to revoke plaintiff's probation, Plaintiff could rely on the procedural projections of the Texas Rules of Civil Procedure.

E. That in the event of an application to revoke Plaintiff's probation, Plaintiff would have the right

to engage in reasonable discovery in defense against such application.

F. That, prior to referring any new case to another lawyer under the referral provisions of the Agreed Judgment, it would be appropriate and necessary for Plaintiff to be retained as counsel prior to making the referral.

G. That Plaintiff would be required to discuss the terms of his probationary service with other persons only when those persons approached Plaintiff to consider employing him as an attorney.

3.25 But for the fraudulent inducements of Defendants, Plaintiff would have proceeded to trial on the charges against him and would have presented a valid defense of each charge.

3.26 Specifically, Plaintiff would have shown in each case presented by Defendants, that he had acted

appropriately within the meaning of the Disciplinary Rules of the State Bar of Texas.

3.27 Not only were Defendants aware that Plaintiff had been misled by fraudulent inducements, but it was Defendants' intention to use the invalid Agreed Judgment to coerce Plaintiff into refraining from the future exercise of his rights and liberties as a citizen and member of the Bar. In particular, Defendants intended to intimidate Plaintiff into abandoning his constitutional right to hold press conferences and engage in other forms of free speech. In the event the Defendants' coercion proved futile, Defendants intended to use the Agreed Judgment to unlawfully punish Plaintiff for the exercise of his rights.

3.28 In September, 1988, Defendants

acted on the fraudulent and malicious intentions by moving to revoke Plaintiff's probation under the terms of the Agreed Judgment. The grounds for Defendant's motion were twofold:

A. First, that Plaintiff had wrongfully accepted employment in new cases; and

B. Second, that Plaintiff had violated the State Bar's rules against false or misleading advertisements by participating in certain communications while in Scotland about a disaster occasioned by the collapse of the drilling platform Piper Alpha in the North Sea.

3.29 Defendants well knew that Plaintiff had not accepted a new case in violation of the settlement agreement. Rather, Plaintiff merely agreed to be retained by a client solely in order to

refer that client to another attorney in accordance with the standard practices and rules governing the State Bar.

3.30 More importantly, Defendants well knew that Plaintiff had reason to believe, and did believe, because of communications with Defendants before and after entry of the Agreed Judgment, that the above mentioned procedure for the referral of new cases had Defendants' approval. For example, Plaintiff specifically had explained his conduct with regard to the alleged new employment to Hartley Hampton, an agent of Defendants who was appointed to monitor Plaintiff's activities during his period of probation. Plaintiff had received Mr. Hampton's approval for his actions.

3.31 Prior to filing the action to revoke Plaintiff's probation, Defendants Peterson and Smoot had conferred with

Plaintiff about the practice of holding press conferences in connection with the mass disasters such as the Piper Alpha incident. Plaintiff explained the method he had used in other cases which was the same method Plaintiff followed in Scotland. Plaintiff received Defendants' approval of this method.

3.32 Defendant knew that Plaintiff's actions in connection with the Piper Alpha disaster while in Scotland were entirely consistent with the rules governing attorneys in Texas, Plaintiff's rights and liberties as a citizen, and the meaning of the Agreed Judgment.

3.33 In prosecuting the action to revoke Plaintiff's probation, Defendants intended to, and did, deprive Plaintiff os his rights under the Texas Rules of Civil Procedure, and of due process of

law as guaranteed to Plaintiff by the federal and state constitutions. Specifically, Plaintiff was deprived of sufficient time to investigate and respond to Defendants' motion and was denied sufficient time to engage in discovery and prepare for trial on Defendants motion. In this regard, by way of example, Plaintiff will show that he received only six days notice of Defendants' intention to revoke his probation before trial on Defendants' petition to revoke was commenced.

3.34 Defendants' petition on the above referenced matters was directly contrary to the position earlier taken in order of fraudulently induce Plaintiff to enter into the Agreed Judgment.

3.35 In October, 1988, Plaintiff's probation was revoked and Plaintiff was suspended from the practice of law from

January 31, 1989 until January 31, 1992.

3.36 Plaintiff has sought every avenue of legal redress available to him in an effort to escape the imposition of the inequitable and unlawful judgment entered against him. These efforts have been unsuccessful and Plaintiff has been prevented from vindicating himself against the fraudulent and unconstitutional conduct of Defendants.

3.37 Pending the appeal of the judgment against him, Plaintiff was denied the ability granted all other litigants to supersede the judgment against him because of a rule of the State Bar of Texas forbidding supersedeas of all judgments suspending or disbarring attorneys.

3.38 The above-mentioned rule is overly broad and does not have any rational relation to the ends sought to

be served. Defendant' application of the rule against Plaintiff denied his equal protection of the law, punished the Plaintiff for the exercise of his liberty of speech, and arbitrarily deprived Plaintiff of his livelihood for three years without rational basis. Defendants caused the rule to be applied to Plaintiff despite the knowledge that the rule was unconstitutional and void on its face.

3.39 The judgment against Plaintiff has now become final by reason of the exhaustion of Plaintiff's appellate remedies.

3.40 Plaintiff has suffered loss of income in the past and future because of Defendants' unlawful, fraudulent and conspiratorial conduct. Plaintiff has further suffered extreme humiliation, embarrassment, emotional distress and

loss of reputation because of the conduct of Defendants.

3.41 The unlawful effects of Defendants' conduct are continuous and ongoing. The judgment against Plaintiff operates as a stigma on his professional standing and reputation. Said judgment further acts as a basis for harsher treatment by Defendants that otherwise prescribed in additional actions which have been brought against Plaintiff.

3.42 Further, Defendants' vendetta is ongoing as evidenced by the fact that they have filed new disciplinary charges against Plaintiff which charges are known by Defendants to be without merit. Said charges are currently pending before the 245th District Court of Harris County, Texas, in the case of The State Bar of Texas v. Musslewhite.

3.43 Most importantly, the judgment

against Plaintiff serves as a coercive and chilling effect, barring Plaintiff from further exercise of the liberties of speech enjoyed by all Defendants.

4.

First Cause of Action:
Equal Protection of Law

4.1 Plaintiff incorporates the foregoing averments in support of this cause of action.

4.2 Defendants persecution of Plaintiff, while simultaneously declining to prosecute others similarly situated, was discriminatory. The selective prosecution of Plaintiff did not rationally serve any legitimate end of the State Bar of Texas. The treatment of Plaintiff by the State Bar of Texas and its agents was disproportionately harsh as compared to the treatment of other attorneys known by Defendants to be similarly situated to Plaintiff.

4.3 As an example of this harsh and unequal treatment, Plaintiff will show that another attorney, according to Defendants' own charges and evidence, was at least as culpable as Plaintiff, if not more so, for any violations of disciplinary rules in connection with the Piper Alpha incident. This attorney was not punished by Defendants, nor even prosecuted.

4.4 There was no rational basis for the disproportionate treatment afforded Plaintiff. Indeed the sole reason for the events related above was Defendants' unreasoning and groundless prejudice against Plaintiff and his chosen method of the practice of law.

4.5 Despite his efforts to do so, Plaintiff has been denied the opportunity to vindicate himself on the ground of selective prosecution and equal

protection of law until the judgment entered against him became final.

4.6 The actions of Defendants, throughout the time referenced herein, and continuing to the present day, deprive Plaintiff of equal protection of the law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I Sec. 3 of the Constitution of Texas.

5.

Second Cause of Action:
Freedom of Speech

5.1 Plaintiff incorporates the foregoing averments in support of this ground of action.

5.2 Throughout the period of time referred to herein, and continuing through the present date, Defendants conspired to, and did, limit Plaintiff's exercise of his liberties of speech, and punished Plaintiff for such exercise.

5.3 The judgment now final against Plaintiff continues to punish and suppress Plaintiff from the free and unfettered exercises of speech.

5.4 Defendants' conduct as alleged herein has deprived, and continues to deprive, Plaintiff of his rights as secured under the First Amendment to the U.S. Constitution and Article I Sec. 8 of the Texas Constitution.

6.

Third Cause of Action:
Due Process of Law

6.1 Plaintiff incorporates the foregoing statements in support of this ground of action.

6.2 Article 10 Sec. 24 of the Texas State Bar Rules, as applied against Plaintiff and interpreted by Defendants, denied Plaintiff the right to supersedeas pending appeal of the judgment against him.

6.3 This rule, as interpreted by Defendants and applied against Plaintiff, deprived Plaintiff of the rights guaranteed him under the Fourteenth Amendment to the U.S. Constitution and Article I Sec. 19 of the Constitution of Texas.

6.4 Although he attempted to do so, Plaintiff was not permitted to litigate the issue before the appellate courts of Texas.

6.5 Each day Plaintiff was barred from practicing law during the pendency of the appeal constituted a new and independent violation of his rights to due process of law.

6.6 As a further violation of his right to due process of law, Plaintiff will show that Defendants' application to revoke Plaintiff's probation was based in large part on events occurring in

Scotland. Subjecting Plaintiff to punishment for conduct engaged in beyond the borders of Texas and the United States is beyond Defendants' jurisdiction and lawful authority.

7.

Fourth Cause of Action: Conspiracy

7.1 Plaintiff incorporates the foregoing averments in support of this cause of action.

7.2 Defendants conspired among themselves and with others, known and unknown to Plaintiff, to deprive Plaintiff of the rights and liberties enjoyed by him as a citizen, a member of the Bar of the state of Texas, and a litigant in the courts of the state of Texas.

7.3 Said conspiracy and its disastrous effect on Plaintiff operated throughout the period of time referred to

herein and continues to the present.

8.

Fifth Cause of Action:
Bill of Review

8.1 Plaintiff incorporates the foregoing averments in support of this cause of action.

8.2 The agreed judgment entered against Plaintiff was the product of unconscionable fraud and duress directed against Plaintiff by Defendants, or, in the alternative, mutual mistake of the parties. Although Plaintiff had good and valid defenses to each and every charge brought against him, he was prevented from asserting these defenses because of his justifiable and reasonable reliance on Defendants' fraudulent inducements and/or because of duress and/or the mutual mistake of the parties.

8.3 Defendants' fraudulent conduct and/or duress and/or the mutual mistake

of the parties was a direct cause of the judgment entered against Plaintiff and the ensuing revocation proceedings.

8.4 Plaintiff has been diligent in pursuing his remedies of appeal from the judgment complained of herein. Those remedies have been unavailing and Plaintiff has no adequate remedy at law for the egregious wrongs done to him.

8.5 Plaintiff invokes the equitable jurisdiction of this Court to rescind the agreed judgment complained of herein and declare said judgment, and all related proceedings, including the revocation proceedings and the revocation judgment, to be void.

9.

Class Action

9.1 Plaintiff will further show that the treatment he has received at the hands of Defendants is consistent with

Defendants' continuing policy of selective and unfair prosecution against certain members of the Bar of this State.

9.2 Defendants unfairly target attorneys involved in the solo practice of law, or who are associated with small law firms for prosecution and punishment under the Defendants' disciplinary rules. Defendants similarly ignore or lightly treat alleged rule violations by members of larger law firms. This distinction maintained by Defendants is arbitrary in that it bears no rational relationship with any legitimate end of Defendants.

9.3 The members of this class of small firms or solo practitioners are suffering deprivation of their rights of equal protection and due process of law at the hands of Defendants.

9.4 The members of this class are so numerous as to make joinder of all its

members impractical. Further, Defendants' discriminatory policies raise issues of law and fact common to the class.

9.5 Plaintiff presents claims herein which are common to all members of the class and Plaintiff will fairly and adequately represent the interests of the class.

9.6 Defendants' practices are in violation of the rights of the class as a whole. Therefore, damages, declaratory and injunctive relief with respect to the class as a whole is appropriate.

10.

Sixth Cause of Action:
Attorney's Fees

10.1 It was necessary for Plaintiff to secure the services of the undersigned attorneys to present this action.

10.2 Plaintiff claims from Defendants reasonable costs and

attorney's fees for the presentation of this suit.

Conclusion and Prayer

WHEREFORE, premises considered, Plaintiff respectfully prays that:

1. Defendants be cited to appear and answer herein and that this case be set for trial before a jury at the earliest date consistent with the court's calendar;

2. A class be certified consisting of all attorneys licensed to practice law in the state of Texas who practice alone or in a small firm and who assert unfair and unequal treatment in the administration of Disciplinary Rules by the State Bar of Texas, or, in the alternative, such class as the court may consider appropriate to the facts nad circumstances herein;

3. Trial by jury be had;

4. Upon the pleadings and findings of the jury, this Court enter judgment declaring that Defendants have deprived Plaintiff and members of the class he represents of their rights in the manner and by the means alleged herein; and

5. This Court declare the agreed judgment against Plaintiff complained of herein, together with all proceedings related thereto, including the revocation judgment, to be void; and

6. Defendants be enjoined from further violations of the rights of Plaintiff and the members of the class he represents; and

7. Plaintiff and members of the class he represents who have been damaged recover reasonable damages, general and special, compensatory and punitive, against Defendants; and

8. Plaintiff and the members of the

class he represents recover reasonable costs and attorney's fees against Defendants; and

9. Plaintiff and the class he represents receive such other relief as may be just and equitable.

Respectfully submitted,

David T. Lopez
Attorney in Charge for Plaintiff
SBOT No. 12563000
Lou Bright
Attorney for Plaintiff
SBOT No. 02991900
3900 Montrose Blvd.
Houston, Texas 77006
(713) 523-3900

OF COUNSEL:

DAVID T. LOPEZ & ASSOC.

Jury Demand

Plaintiff respectfully requests that all issues of fact, save those expressly reserved by law for the Court, be determined by a jury.

APPENDIX F

ARTICLES IN ADDITION TO, AND IN AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES

Proposed by Congress and Ratified by the Several States, Pursuant to the Fifth Article of the Original Constitution

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

In the original, the amendments are set out as "articles in addition to, and amendatory of, the Constitution . . . ." Since they are usually referred to simply as "amendments," that term is used herein instead of the word "Article," so as to avoid confusion with the body of the Constitution.

The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several states by the First Congress, on the 25th of September, 1979. They were ratified by the following states, and the

notifications of ratification by the governors thereof were successively communicated by the President to Congress: Delaware, January 28, 1790; Maryland, December 19, 1789; New Hampshire, January 25, 1790; New Jersey, November 20, 1789; New York, March 27, 1790; North Carolina, December 22, 1789; Pennsylvania, March 10, 1790; Rhode Island, June 15, 1790; South Carolina, January 19, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791. The following of the thirteen original states did not ratify until the year 1939: Connecticut, April 10; Georgia, March 18; Massachusetts, March 2.

Amendments:

1. Religious and political freedom.
2. Right to bear arms.
3. Quartering soldiers.
4. Unreasonable searches and seizures.

5. Criminal actions-Provisions concerning-Due process of law and just compensation clauses.
6. Rights of the accused.
7. Trial by jury in civil cases.
8. Bail-Punishment.
9. Rights retained by people.
10. Rights reserved to states or people.
11. Suits against states-Restriction of judicial power.
12. Election of President and Vice-President.
13. Section 1. Slavery prohibited.
    2. Power to enforce amendment.

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

APPENDIX G

AMENDMENTS

ARTICLES IN ADDITION TO, AND IN AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES

Proposed by Congress and Ratified by the Several States, Pursuant to the Fifth Article of the Original Constitution

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

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ratified by the following states, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: Delaware, January 28, 1790; Maryland, December 19, 1789; New Hampshire, January 25, 1790; New Jersey, November 20, 1789; New York, March 27, 1790; North Carolina, December 22, 1789; Pennsylvania, March 10, 1790; Rhode Island, June 15, 1790; South Carolina, January 19, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791. The following of the thirteen original states did not ratify until the year 1939: Connecticut, April 10; Georgia, March 18; Massachusetts, March 2.

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7. Trial by jury in civil cases.

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9. Rights retained by people.

10. Rights reserved to states or people.

11. Suits against states-Restriction of judicial power.

12. Election of President and Vice-President.

13. Section 1. Slavery prohibited.

2. Power to enforce amendment.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Sec. 2. Representatives-Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the

Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for the participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of

the United States, or as a member of any state legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned-Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the

loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

HISTORY, ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The Fourteenth Amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Thirty-ninth Congress, on the 16th June, 1866. On the 21st day of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine,

Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the constitution of the United States, duly proposed by two-thirds of each house of the Thirty-ninth Congress: Therefore, Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed Fourteenth Amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty

of the thirty-six states, viz: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866 (although the legislature of the same state passed a resolution in April, 1868, to withdraw its consent to it); Oregon, Sept. 19, 866; Vermont, Nov. 9, 1866; Georgia, July 21, 1868 (having previously rejected it Nov. 13, 1866); North Carolina, July 4, 1868 (having previously rejected it Dec. 4, 1866); South Carolina, July 9, 1868 (having previously rejected it Dec. 20, 1866); New York, Jan. 10, 1867; Ohio, Jan. 11, 1867 (although the legislature of the same state passed a resolution in January, 1868, to withdraw its consent to it); Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Kansas, Jan. 18, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22,

1867; Missouri, Jan. 26, 1867; Indiana, Jan. 29, 1867; Minnesota, Feb. 1, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 13, 1867; Pennsylvania, Feb. 13, 1867; Michigan, Feb. 15, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Apr. 3, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868; and Alabama, July 13, 1868. Georgia again ratified it Feb. 2, 1870. Texas ratified it Feb. 18, 1870 (having rejected it Nov. 1, 1866). Virginia ratified it Oct. 8, 1869 (having rejected it Jan. 19, 1867). The amendment was rejected by

APPENDIX H

RULES OF APPELLATE PROCEDURE

GENERAL PROVISIONS

Rule 41. Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the

grant or continuance of a stay of the mandate.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES 1967 ADOPTION

The proposed rule follows the rule or practice in a majority of circuits by which copies of the opinion and the judgment serve in lieu of a formal mandate in the ordinary case. Compare Supreme Court Rule 59. Although 28 U.S.C. Sec. 2101(c) permits a writ of certiorari to be filed within 90 days after entry of judgment, seven of the eight circuits which now regulate the matter of stays pending application for certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule. Compare D.C. Cir. Rule 27(e).

Supreme Court, U.S.
FILED
MAY 4 1995
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(3)

No. 94-1662

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BENTON MUSSLEWHITE
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

Linda A. Acevedo
Assistant General Counsel
Office of the General Counsel
STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711-2487
512/463-1463
512/477-4607 (FAX)

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STATEMENT OF THE CASE

On March 25, 1992, Musslewhite, Petitioner, filed a civil rights action pursuant to 42 U.S.C. §1983 against the State Bar of Texas, its Executive Director, General Counsel, and several members of the Board of Directors of the State Bar seeking injunctive, declaratory, monetary, and equitable relief. (*See* Appendices to Petition for Writ of Certiorari ("App."); A61). All claims made by Musslewhite revolve around alleged violations occurring in the context of the investigation and prosecution of Musslewhite for various acts of professional misconduct and during the proceedings for the revocation of Musslewhite's probated suspension from the practice of law.

The State Bar of Texas, Respondent, filed a Motion to Dismiss which was granted by the

District Court. (App. A57; Appendix C). On September 23, 1994, the Fifth Circuit Court of Appeals affirmed the judgment of the District Court primarily on the basis of *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)* and *Howell v. State Bar of Texas, 710 F.2d 1075 (5th Cir. 1983), cert. denied, 466 U.S. 950 (1984).* (App. A1).

STATEMENT OF FACTS

Two lawsuits were initiated against Musslewhite in the state district courts of Harris County, Texas, in 1986 and 1987. Each suit was brought by or on behalf of a grievance committee of the State Bar of Texas seeking disbarment, suspension, or reprimand of Musslewhite because of various acts of professional misconduct as alleged in the petitions filed. The two suits were

consolidated and prosecuted as a single suit. Musslewhite agreed to settle the disciplinary action by entry of an Agreed Judgment.

This Judgment provided that Musslewhite would be actually suspended from the practice of law for ninety (90) days, and would be on probation for three (3) years. The Agreed Judgment also provided that the probation could be revoked if Musslewhite violated any of the probationary terms.

Subsequently, a Motion to Revoke Probation was filed pursuant to the terms of the Agreed Judgment. After hearing by the trial court, Musslewhite's probation was revoked and he was ordered suspended from the practice of law for three (3) years, from January 31, 1989, to January 31, 1992.

Following entry of the Order revoking

Musslewhite's probation, he attacked the refusal of the trial court to stay the suspension pending appeal or to grant a supersedeas bond, filing first in the Texas Court of Appeals for the First District in Houston, Texas, and then in the Texas Supreme Court, a Motion for Leave to File a Petition for Writ of Mandamus, Prohibition, and Injunction. Both Courts denied Musslewhite's motions. Musslewhite also sought an application for stay from the United States Supreme Court which was also denied.

Musslewhite then perfected an appeal to the Texas Court of Appeals for the Fourteenth District in Houston, Texas, upon 23 points of error. All points of error were decided adversely to Musslewhite by the Court of Appeals and the judgment was affirmed. *Musslewhite v. State Bar of*

Texas, 786 S.W.2d 437 (Tex.App.--Houston [14th Dist.] 1990, writ denied) cert. denied, 501 U.S. 1251 (1991). Neither the Texas Supreme Court nor the U.S. Supreme Court found persuasive reasons to reexamine the matter.

In his appeal to the Fourteenth Court of Appeals and the Supreme Court of Texas, Musslewhite attacked the factual sufficiency of the evidence; the alleged procedural infirmities raised by Musslewhite in the action presented to the District Court; the constitutionality of Disciplinary Rule 2-101, Texas Code of Professional Responsibility; the alleged due process and equal protection violations, including selective prosecution and denial of a supersedeas bond; and every other deprivation claimed by Musslewhite in this action. In each court, Musslewhite's contentions were

considered and overruled.

Musslewhite's action is an attack on a valid, existing state court judgment, the sanctions of which have expired prior to the filing of this action. Musslewhite's suspension from the practice of law was completed on January 31, 1992. This action by Musslewhite raises substantially the same issues that have been litigated in the state courts and even in the Supreme Court of the United States.

OBJECTION TO JURISDICTION

Petitioner, Musslewhite asserts jurisdiction of this Court pursuant to 28 U.S.C. §1254 (1), i.e., by writ of certiorari. However, Musslewhite has failed to establish jurisdiction pursuant to Rule 10.1(a) of the Rules of Supreme Court of the United States. The Fifth Circuit did not render a decision in conflict with the decision of another United States

court of appeals on the same matter. On the contrary, the decision is directly in line with other court of appeals decisions regarding attempts by lawyers to have their state court disciplinary judgments reviewed. Nor did the Fifth Circuit decide a federal question in a way in conflict with a state court of last resort.

Therefore, the petition should be denied for lack of jurisdiction.

ARGUMENT

I.
(In Response to Question No. 1)

Musslewhite did not raise a general challenge to the Texas disciplinary scheme.

The Fifth Circuit correctly found that all of Musslewhite's claims were either complaints regarding his particular case or were so

"inextricably intertwined" with his state court judgment of disbarment that the district court lacked jurisdiction to hear them.

The United States District Courts do not have jurisdiction over challenges to state court proceedings in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 463 (1983).* Nor may the District Court sit as an appellate court to review general constitutional claims which are "inextricably intertwined" with a state court judgment of reprimand. *Howell v. State Bar of Texas, 7109 F.2d 1075, 1077 (5th Cir. 1983), cert. denied, 466 U.S. 950 (1985).*

Although cast in alleged deprivations of

constitutional rights, a review of both Musslewhite's original complaint and brief filed with the Fifth Circuit and before this Court clearly shows that what Musslewhite seeks is nothing more than a review of the state court judgment of suspension and the disciplinary proceedings initiated against him.

By his own pleading, Musslewhite is complaining of actions taken with respect to his particular case which through judicial action, resulted in suspension. Nowhere in his complaint does Musslewhite challenge the constitutionality of a particular state bar rule or statute governing the profession promulgated in nonjudicial proceedings. All of Musslewhite's constitutional challenges are specific to his difficulties through the state disciplinary procedure.

His original complaint begins with a self-laudatory recitation of his career. (App. A61; Paragraphs 3.1-3.10). Beyond this, Musslewhite merely catalogues the proceedings taken against him beginning with the 1986 suit for professional misconduct, the Agreed Judgment, his understanding of the terms of the judgment, the revocation proceedings, the sufficiency of the State Bar's evidence, and the revocation itself which resulted in the judgment of suspension and concludes with the allegations that through these proceedings the State Bar conspired to violate his rights to freedom of speech, equal protection, and due process of law through their application of the state disciplinary scheme against him. (App. A61; Paragraphs 3.17-3.43).

One of his primary requests for relief is that

the Court "declare the agreed judgment against Plaintiff complained of herein, together with all proceedings related thereto, including the revocation judgment, to be void." (App. A61; Prayer #7).

Musslewhite's briefs in the appellate courts are presented with similar argument relating to the procedures taken against him including the refusal by the trial court to grant a supersedeas during appeal, the refusal of the trial court to grant a transfer of venue, the inequity of the degree of discipline, the absence of notice, the failure to grant a jury trial, and arguments concerning his rights of equal protection and First Amendment. Once again he details his decision to settle the original lawsuit, the "frivolous" revocation proceedings, and his "naivete in appealing" (in which he attacks the integrity of the courts of appeals and state supreme

court). Musslewhite does nothing more than argue the merits of the state disciplinary action and ask the District Court to sit as an appellate court and review the state court judgment.

Musslewhite asserts that he does make a general constitutional attack in what he refers to as the "class action general, constitutional attack on the Texas disciplinary scheme." However, as the Fifth Circuit recognized:

> "Musslewhite couched some of his averments in the language of a general constitutional attack on the State Bar's scheme of disciplining attorneys. Merely using catch phrases, however, will not vest the federal district court with jurisdictional authority to entertain the action. This is about substance, not form. Instead, we must ascertain what the court is being asked to review."

32 F.2d 942, 947 (5th Cir. 1994).

This claim by Musslewhite is simply another attack

on the State Bar's procedures as applied to him. All of the evidence to which Musslewhite alludes goes solely to his disciplinary proceeding. Thus, this complaint has no merit.

II.
(In Response to Question No. 2)

The state courts addressed the First Amendment issue and Musslewhite's challenge regarding selective prosecution was never raised before the state courts.

The Texas disciplinary scheme is fully capable of considering the constitutional arguments of attorney-defendants relating to specific procedures followed in their case. *Bishop v. State Bar of Texas, 736 F.2d 292, 294 (5th Cir. 1984).* Furthermore, the United States Supreme Court has recognized the competence of state courts to adjudicate federal constitutional claims. *Feldman at 483. See, e.g., Sumner v. Mata, 449 U.S. 539*

(1981); *Allen v. McCurry, 449 U.S. 90 (1980)*; *Swain v. Pressley, 430 U.S. 372 (1977).*

In the case at hand, Musslewhite unsuccessfully challenged the sufficiency of the evidence and questioned the propriety of the action against him, raising the same issues that he has attempted to present to this Court including the constitutional claims of any fraudulent conduct or deception by the State Bar of Texas. In addition, the District Court may not entertain a general constitutional challenge to a state's disciplinary scheme when that challenge has not been presented to the state court in the first instance. *Thomas v. Kadish, 748 F.2d 276, (5th Cir. 1984). cert. denied, 473 U.S. 907 (1985).*

The state courts fully considered Musslewhite's First Amendment arguments and

clearly rejected his contention that the State Bar rule was unconstitutionally vague either on its fact or as applied. *Musslewhite v. State Bar of Texas, 786 S.W.2d 437 (Tex.App.--Houston [14th Dist.] 1990, writ denied), cert. denied, 501 U.S. 1251 (1991).* The fact that they did not address the issue to Musslewhite's satisfaction is irrelevant.

As to his claim of selective prosecution, Musslewhite did not properly raise this issue before the state courts and thus it cannot now be considered by the federal court. *Thomas v. Kadish, 748 F.2d 276, (5th Cir. 1984), cert. denied, 473 U.S. 907 (1985).* It is irrelevant, even if true, that Musslewhite did not discern his facts at the time of the state court proceedings. No exception exists. Thus, to the extent he presented such defenses and challenges, they have been decided adversely to him

by courts of competent jurisdiction in both the state and federal systems. The judgments of those courts are entitled to full faith and credit by this court. To the extent Musslewhite chose not to present such defenses or issues, he has waived them and is now precluded from raising them for the first time in this court. *Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), cert. denied, 473 U.S. 907 (1985).* Under either view, presentation and determination or waiver of issues by not presenting them, Musslewhite is now barred from raising and litigating the claims contained in his complaint. Therefore, this point has no merit.

III.
(In Response to Question No. 3)

Musslewhite's claims of bad faith would require a collateral examination of the state court judgment.

No exception to the *Feldman* doctrine exists for allegations of bad faith. In the present case, the challenged state court judgment has already been fully "executed" and discharged. Musslewhite was suspended from the practice of law and has completed that suspension. That judgment imposes no further restraints or impediments upon Musslewhite's practice of law. Therefore, *Younger v. Harris, 401 U.S. 37 (1971)* is inapplicable as well.

IV.
(In Response to Question No. 4)

The Court of Appeals has the power to revise its judgment at any time before the mandate is issued.

Musslewhite complains that the Fifth Circuit did not have the ability to revise its judgment because it was bound to issue the mandate within

twenty (20) days of its initial judgment. However, the cases he cites in support of this position are inapplicable. Almost all have to do with the ability of the court to recall a mandate once it has been issued. The ones dealing with a stay of the mandate involve situations when a petition for writ of certiorari has already been denied.

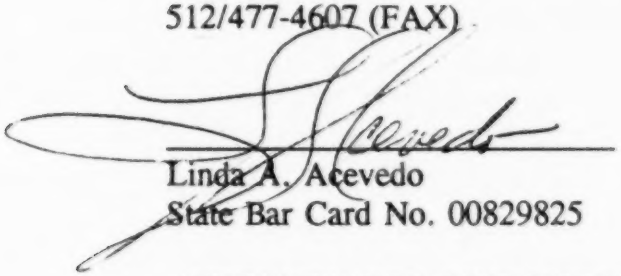
In addition, in *United States v. Foumai, 910 F.2d 617 (9th Cir. 1990)*, the court held that the jurisdiction of the court of appeals does not terminate until issuance of the mandate. A court of appeals may modify or revoke its judgment at any time prior to issuance of the mandate, sua sponte, or by motion of the parties.

PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

Linda A. Acevedo
Assistant General Counsel
Office of the General Counsel
STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711-2487
512/463-1463
512/477-4607 (FAX)

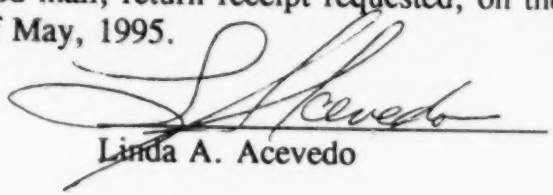


Linda A. Acevedo
State Bar Card No. 00829825

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Benton Musslewhite, 1520 Lyric Office Center, 440 Louisiana, Houston, Texas 77002, pro se, by delivery of true and correct copies to him by certified mail, return receipt requested, on the 3rd day of May, 1995.



Linda A. Acevedo